OUTLINES

OF THE

LAW OF AGENCY

BY

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NOTE TO SECOND EDITION

The following pages have been printed to accompany the writer's collection of Cases on Agency, for use in the Department of Law of this University. Nothing has been attempted beyond the merest outlines of the subject. Explanation as well as illustration has in general been left to be supplied by the cases.

F. R. M.

University of Michigan,
Ann Arbor, January 1, 1903.

NOTE TO THIRD EDITION

In the revision of this book, its scope has been somewhat enlarged and its statements somewhat expanded. Nevertheless, it pretends to be nothing more than its title indicates, namely, an outline of the subject. No attempt has been made to cite many cases. Those selected have, as a rule, been chosen largely because of their supposed general availability.

Floyd R. Mechem.

University of Chicago,
June 1, 1923.

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OUTLINES OF THE LAW OF AGENCY

CHAPTER I.

INTRODUCTION.

§ 1. Meaning of the word Agency.
2. Possible distinctions—Manner of acting.
3. —— Degree of discretion.
4. Nature of the thing to be done.
5. —— Degree of control.
6. Nomenclature to be adopted.
7. Historical.
8. Agency is a commercial development.
9. The maxims of agency.
10. Agency important in the contract field.

§ 1. **Meaning of the word.**—It not infrequently happens that in discovering the ideas which lie behind a given word, a consideration of its etymology will be helpful. That is especially true in the present case. The word agent or agency, from *ago, agere, agens, agentis,* denotes an actor, a doer, a force or power that accomplishes things. Observation will show that the word has a wide range of use. Thus the chemist speaks of chemical agents, and the physician of therapeutic agents, the moralist declares that this or that institution or organization is an agency for good or evil; we say that man is a free moral agent. In a recent editorial the writer referred to party allegiance as the "great agency" for securing majority rule, and to a political party as a "responsible agent" of government. This agent or agency may at times be a physical or material thing; at others it may be intangible and immaterial. It may be used for a person or against him. When physical or material, it may be a person, an animal or a tool. In the sense in which it is used in the present subject it denotes usually one human being who is used by another as a means of accomplishing some purpose of the latter.

§ 2. **Possible distinctions—Manner of acting.**—With respect of the manner of acting there may be wide differences, though the result may be the same. Thus if I wish an article purchased for me, I may employ another person to make the purchase. He may buy it in his own name, without disclosing my interest, and then transfer it to me; or he may buy it in my name and as my declared representative, and then deliver the article to me. I get it in either case, but the legal machinery differs in the two cases. The former method is more typical of the Roman law of Agency, while the latter is more typical of our English and American law.

§ 3. —— **Degree of discretion.**—With respect of the degree of discretion confided to the person employed, there may be wide differences. Thus he may be, in one case, a skilled and trusted negotiator to whose discretion the whole matter is confided while, in another, he may be a mere messenger sent simply to declare the conclusions at which his employer has arrived without the aid of any intermediary.

§ 4. —— **Nature of thing to be done.**—With respect of the nature of the thing to be done, there may be marked differences. It may, perhaps, be mere physical labor, or work, more or less skilled, upon materials, or personal attendance or service; or it may be representing and taking the place of the employer in business negotiations with third persons, in the making of contracts or alliances, or in proceedings before boards, commissions or tribunals. There is a distinction possible between labor or service on the one hand, and business dealings or representation, on the other. The latter case involves or contemplates contractual dealings with third persons; the former does not.

§ 5. —— **Degree of control.**—With respect of the degree of control over the manner of doing the work while it is being done, there may be important differences. In one case I may employ men to work under my personal direction and control; in another, I may make a contract with a man to do a piece of work for me, paying him perhaps, a lump sum for it, but leaving him free to do it by his own methods, at his own time, and with his own materials and helpers, holding him responsible for the results rather than for the methods. Thus, if I wish a building erected, I may employ a builder to construct it for a fixed price, he furnishing the materials and labor; or I may buy the materials myself and hire workmen to construct it under my direction; or, instead of buying and hiring in person, I may employ someone to act for me in that regard and to oversee the erection for me.

In such a situation, as will be seen, I may either employ a contractor, or I may employ workmen or servants, or I may employ an agent to employ the workmen or servants for me. In the latter case only is the person employed expected or authorized to make contracts for his employer with other persons.

§ 6. Nomenclature to be adopted.—To find a satisfactory nomenclature to represent these possible distinctions is not easy. It is common to call the builder, in the case supposed, an *independent contractor;* to call the workmen employed in the second case *servants;* and to call the intermediary employed to hire the workmen, in the third case supposed, an *agent.* But what generic term can be used which will include them all? If we call the whole field Agency, as is commonly done, we leave ourselves no distinctive name for the third case supposed, but must group agents under Agency. It has been proposed that the generic name be Representation, and that we distinguish under it Employer and Independent Contractor; Master and Servant; and Principal and Agent; but this suggestion has not been generally accepted, and Agency seems to be the generic title most likely to be used, with these three relations distributed under it. It will be so used here. Historically, as will be seen, the practice was the opposite, *i. e.,* Agency was treated as a branch of the law of Master and Servant.

The classification here suggested may be tabulated thus—

Agency
- Principal and Agent.
- Master and Servant.
- Employer and Independent Contractor.

Instead of Agency, we may, as has been proposed, write Representation, or, perhaps, Employment.

Instead of Master and Servant, under Agency, we may, in pursuance of modern usage, substitute Employer and Employee.

§ 7. **Historical.**—The subject of Agency belongs to a comparatively recent period in our law. Blackstone scarcely refers to it. "The law of principal and agent," says Blackstone's learned editor, Professor Hammond,[1] "is derived from the canon law, and has only been introduced into the common law in recent times. If the older books of English law are examined, no such words as 'principal and agent' will be found in them. Whereever any question is discussed which would now be treated under that head, it is treated of as master and servant. Principal and agent does not occur in Viner's Abridgement, or those preceding it; and it is only at the end of the eighteenth century that we find it beginning to appear as a separate title, as yet of very limited application."

"As late as Blackstone," says Mr. Justice Holmes in his book on the Common Law,[2] "agents appear under the general head of servants, and the first precedents cited for the peculiar law of agents were cases of master and servant. Blackstone's language is worth quoting: 'There is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial capacity; such as *stewards, factors,* and *bailiffs:* whom, however, the law considers as servants *pro tempore,* with regard to such of their acts as affect their master's or employer's property.' "[3]

"The early Roman law of contracts," says Mr. Hunter, "was absolutely destitute of the notion of agency," and he gives some reasons for this condition.[4]

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[1] Book I. p. 719.

[2] Page 228.

[3] 1 Comm. 427.

[4] See Hunter's Roman Law (3d ed.) p. 609.

In France and Germany, agency is now dealt with as part of their civil codes. To some extent, in the United States, such codification has taken place. Examples of these codes will be found in the Appendix.

§ 8. Agency a commercial development,—Agency belongs distinctively to a commercial age, and its growth has kept pace with the progress of commercial development. It furnishes the means by which the range of individual and corporate activity is enormously increased. As soon as it is conceded that one man may be represented by another in business transactions, and that he may have as many such representatives as occasion may require, the field of commercial activity is immensely widened. The modern business man may thus be constructively present in many places and carry on diverse and widely separated industries at the same time.

Agency is obviously, therefore, a useful and beneficial device.

§ 9. The maxims of Agency.—Maxims, as a rule, are, at best, only half-truths. Two are so constantly referred to in this field that they must be noticed.

The fundamental maxim of Agency, both as to right and liability, is *Qui facit per alium, facit per se.* Its second great maxim, also of right and liability, referring to the time when the right or liability is created, is *Omnis ratihabitio retrotrahitur et mandato priori aequiparatur.*

§ 10. Agency important in the contract field.—Agency belongs in the field of contract law. The relation between the principal and his agent is, as will be seen, usually a contractual relation, while the purpose of its creation is usually to create, modify, terminate or otherwise affect contractual relations between the principal and third persons.

CHAPTER II.

DEFINITIONS AND DISTINCTIONS.

§ 11. Agency defined.
12. Principal and agent.
13. Parties involved.
14. Agency as a contractual relation.
15. Relation usually a voluntary one.
16. —— Exceptions—Authority created by law.
17. How agent compares with servant.
18. —— Distinction in name usually of little practical importance.
19. —— Occasionally distinction important.
20. How agent compares with "independent contractor."
21. Agency differs from a trust.
22. Agency to be distinguished from sale.
23. Agency differs from lease.
24. The contract creating—"Power of attorney."
25. Classification of agencies—Actual or ostensible.
26-27. —— Universal, general, and special agency.
28-30. —— How many of each principal may have.
31. ——How nature of agency to be proved.
32-36. —— Professional and non-professional agents.
37-39. —— Distinctions between these classes of agents.

§ 11. Agency defined.—In the broad sense pointed out in the preceding chapter, the word agency denotes the relation which exists when one person is employed to act for another. As there suggested, three forms of the relation are commonly grouped together: 1. The relation of principal and agent; 2. The relation of master and servant; and 3. The relation of employer and independent contractor. All three,—the first two especially—have points of similarity; they also have aspects of real distinction.

This book is designed to deal primarily with the relation of principal and agent; but the relation of master and servant has so many similarities that considerable attention will be paid to it, and illustrations will be freely drawn from either field.

Some attention will also be given to the independent contractor.[1]

§ 12. **Principal and agent.**—The relation of principal and agent, or the relation of agency in the narrower sense in which it is chiefly employed in this book, is the legal relation which exists where one person, called the agent, is employed and authorized by another, called the principal, to represent and act for the latter in his contractual or business dealings with third persons.

§ 13. **Parties involved.**—Agency, in the sense in which it is here used, contemplates three parties:—the principal, the agent, and the third person with whom the agent is to deal. Master and servant, on the other hand, does not necessarily contemplate more than two, though there are, of cause, cases in which the performances of the service may involve third parties. Each of the three parties to the agency relation may incur obligations to each of the others, and there are therefore presented six possible aspects, namely—the principal against the agent, the agent against the principal, the third party against the agent, the agent against the third party, the principal against the third party, and the third party against the principal.

§ 14. **Agency as a contractual relation.**—Agency—including also independent contractor and master and servant in modern times, belongs among those relations commonly known as contractual, meaning by that term those relations whose beginning and ending and whose attendant rights and duties, may, in general, be controlled by the contract or agreement of the parties, and are not merely created or imposed by law.

It is not a relation of *status*, within the generally accepted definition of that term.[2] Neither is it properly to be described as an *office*.[3] It is sometimes said that agency is merely a grant, and not a matter of contract; but to call it a grant is not conclusive. Grants may form part of a contract; they may be made for a consideration as well as without one; the grant may be the consideration for a promise, or a promise may be the consideration for the grant. Even if the agency in a given case were "gratuitous," it would usually carry with it obligations (*e. g.*, on the agent's side, not to abuse or exceed the authority, and, on the principal's side, to reimburse or indemnify the agent), which could be enforced by contractual actions at least; even if they were not themselves contractual.

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[1] In some law schools, master and servant, and principal and agent, are treated together in a single course; in others, they are treated separately. Master and servant was formerly very frequently considered as one of the so-called Domestic Relations.

That there may, nevertheless, be situations in which the principal may be bound to third persons by the contracts or the torts of an agent or servant who had no capacity to bind himself contractually to his principal, is evidenced by the cases wherein the agent or servant was a slave, an infant or a married woman at common law.[4]

Normally and usually, however, there will be a contract of employment between the principal and the agent.

§ 15. **Relation usually a voluntary one.**—The position of the parties to this relation is usually a voluntary one. Speaking first of the agent,—it is true that a master may compel his slave to act for him; a parent may require action from his child; at common law a husband had a measure of control over his wife; the hired servant may to some degree have subordinated his will to that of his employer; and accidental circumstances may otherwise have put one under the domination of another, but in modern times all of these cases are, in fact, exceptional, and in general no one in law is bound against his will to be the agent of another.

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[2] This is, of course, largely a question of definition. Those who assert that agency is a matter of *status* are using the term in a sense different from that which seems to the present writer to be sustained by the best opinion. See Holland's Jurisprudence (10th ed.), p. 136.

[3] This also is, to some extent, a question of definition. Agency is certainly not a public office, and to call it a private office, as is sometimes done, is to raise questions as difficult as those which this definition was suggested to solve.

[4] See *post* § 66, *et seq.*

The position of the third party is usually entirely voluntary; no one is, in general, legally obliged to deal with another either in person or through his agent.

Speaking next of the principal, his legal independence is usually complete. As a rule, no one can be bound by the act of another unless he has in some way, either expressly or by implication, consented that that other may act for him.

§ 16. —— Exceptions—Authority created by law.—In a few cases, however, authority to act as agent for certain purposes is sometimes said to arise by mere operation of law, as an incident of some other relation in which the parties already stand. Of these alleged cases there are four chief types:

(1) The authority of the wife to buy necessaries on her husband's credit.

(2) The similar authority of an infant child to buy necessaries, in certain cases, upon his father's credit.

(3) The authority of the vendor of personal property in certain cases to sell the goods still in his possession to secure his pay.

(4) The authority of a ship-master to buy necessaries on the owner's credit.[5]

In these cases the assent of the principal is not necessary, and his dissent would in most cases be unavailing. This authority is sometimes said to be created by law, or to be authority by necessity.[6]

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[5] The master has also, in times of stress, authority to incur obligations for the owner of the goods in his care, which has been spoken of as being "founded on necessity." See Gaudet v. Brown (1872), L. R. 5 Pr. C. at p. 165.

[6] Thus Mr. Leake, Contracts, 6th ed. p. 318, speaks of cases of "agency implied from necessity." In Benjamin v. Dockham (1883), 134 Mass. 418, Mechem's Cas. 71, Holmes, J., says that the law "creates a compulsory agency" in the wife to pledge her husband's credit in certain cases. See also, *per* Pollock C. B., in Johnston v. Sumner (1858), 3 H. & N. 261; Hendricks v. American Express Co. (1910), 138 Ky. 704, 128 S. W. 1089, 32 L. R. A. (N. S.) 867.

These, probably however, are not properly to be described as agencies created by law, or in the first three classes, at least, as agencies at all. The first two are probably better disposed of as cases of *quasi*-contract. The third has been held not to be a case of agency.[7] The fourth is doubtless a case of agency implied in fact.

§ 17. How agent compares with servant.—As has already been pointed out, Agency was formerly regarded as a branch of Master and Servant. But with the growth of commerce and the development of the law, a distinction has been established, and in the modern view, while the relation of principal and agent bears a close resemblance to that of master and servant, it is not identical with it.[8]

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[7] See Moore v. Potter (1898) 155 N. Y. 481, 50 N. E. 371, 63 Am. St. R. 692.

[8] See the elaborate discussion in Kingan v. Silvers (1894), 13 Ind. App. 80, 37 N. E. 413, Goddard's Cas. 6, Reinh. Cas. 5.

"The distinction between a servant and an agent," it is said by Mr. Justice Holmes in his edition of Kent's Commentaries (Vol. 2, p. 260, note), "is the distinction between *serving* and *acting for*."

"The great and fundamental distinction between a servant and an agent," said Professor Dwight, (Persons and Personal Property, p. 323), "is, that the former is principally employed to do an act for the employer not resulting in a contract between the master and a third person, while the main office of an agent is to make such a contract. Servants may make contracts incidentally, while agents may in the same way render acts of service. The principal distinction between them, however, is as above stated."

Professor Huffcut (Agency, 2d ed. § 4), said: "The primary distinction between representation through an agent, and representation through a servant, lies in the nature of the act which the representative is authorized to perform. An agent represents his principal in an act intended or calculated to result in the creation of a voluntary primary obligation or undertaking. A servant represents his master in the performance of an operative or mechanical act of service not resulting in the creation of a voluntary primary obligation, but which may result, intentionally or inadvertently, in the breach of an existing one. An agent makes offers, representations or promises for his principal, addressed to third persons, upon the strength of which such third per-

The characteristic of the agent is that he is a business representative. His function is to bring about, modify, terminate, or otherwise affect the contractual relations between his principal and third persons, or to appear for or represent his principal in proceedings or negotiations in which he may be interested.

The function of the servant is to execute the commands of his master, chiefly in reference to things, but occasionally with reference to persons when no contractual obligation is to result.

A person who is ordinarily a servant may at times act as agent, and *vice versa.*

The agent usually is vested with more or less discretion, while the servant is commonly required to act according to the directions of his master; and this has sometimes been suggested as the basis for distinguishing between the two relations.[9]

The true distinction, however, is believed to be that already mentioned.

§ 18. —— Distinction in name usually of little practical importance.—The distinction between the two relations, so far as the name is concerned, though in many aspects radical in theory, is not of great practical importance, as the same rules of law, in many cases, apply equally to both relations.

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sons change their legal relation or position. A servant performs operative acts not intended to induce third persons to change their legal relations."

On the other hand, Mr. Charles Claflin Allen, in 1894 contributed an article in 28 American Law Review, 9, on "Agent and Servant Essentially Identical." This view is referred to with approval in Brown v. German Amer. Title & Trust Co. (1896), 174 Pa. 443, 34 Atl. 335.

The California Code (followed in Montana and the Dakotas) distinguishes thus: "An agent is one who represents another called the principal in dealings with third persons." "A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master."

[9] See Baltimore & Ohio Employees' Relief Ass'n v. Post (1888), 122 Pa. 579; 15 Atl. 885; 9 Am. St. R. 147; 2 L. R. A. 44.

There is, in many quarters, a somewhat marked repugnance to the use of the word "servant," because it is supposed to emphasize social distinctions which ought not to exist among us. This leads, in popular language, to the substitution of the word "agent," and this popular use is often exhibited by the courts, with the result that even in legal language the word "agent" is coming to be more and more used where the word "servant" would be more appropriate. Fortunately it is usually immaterial and leads to no serious difficulty.

(There is also, as has been stated, a tendency to substitute Employer and Employee for the older titles Master and Servant.)

§ 19. —— **Occasionally distinction important.**—There is, however, occasionally a case in which the distinction becomes important. A statute, for example, may use one word or the other under circumstances which call for strict construction, and it then becomes important to distinguish.[10]

If, for example, a statute provides for the punishment of embezzlement by an "agent," one not properly to be deemed an agent would not be within its reach; and if a statute extended a privilege or immunity to "laborers" or "servants," one not properly to be considered in those classes could not claim it.[11]

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[10] Thus, see Echols v. State (1909), 158 Ala. 48, 48 So. 347, Goddard's Cases on Agency 1, where the defendant was held not to be an "agent," within the statute. See also Pullam v. State (1884), 78 Ala. 31, 56 A. Rep. 21. In State v. Hubbard (1897), 58 Kan. 797; 51 Pac. 290, 39 L. R. A. 860; Reinhard's Cases on Agency, 1, a receiver was held to be an "agent" within the statute. Compare Regina v. Walker (1858), D. & B. Cr. Cas. 600, Mechem's Cases on Agency 1, where defendant was held not to be a "servant" within the statute. See also Wynegar v State (1901), 157 Ind. 577; 62 N. E. 38.

[11] Thus, see Wakefield v. Fargo (1882), 90 N. Y. 213, Mechem's Cas. 4, where a book-keeper and general manager was held not to be a "laborer or servant," within such a statute.

An attorney at law, with respect of his retainer and fees, is not within a statute giving preference to the "wages or salaries of clerks, servants or employees." Lewis v. Fisher (1894), 80 Md. 139, 30 Atl. 608, 45 Am. St. R. 327, 26 L. R. A. 278.

The salary due to a travelling salesman is not a "labor debt," within a constitutional provision

§ 20. How agent compares with "independent contractor." —The *agent*—and the servant also—is further to be distinguished from the *"independent contractor,"* who is one who exercises some independent calling, occupation, or employment, in the course of which he undertakes, supplying his own materials, servants and equipment, to accomplish a certain result, not being subject while doing so to the direction and control of his employer, but being responsible to his employer for the end to be achieved, and not for the means by which he accomplishes it.[12] Usually, he is paid "by the job," that is to say, his com-

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giving such debts a preference. Jones v. Avery (1883), 50 Mich. 326, 15 N. W. 494; but such a salesman was held to be a "clerk" within a statute protecting money owing to "laborers, servants, clerks and operatives." Hand v. Cole (1890), 88 Tenn. 400, 12 S. W. 922; 7 L. R. A. 96.

The commissions of a travelling salesman are not "the wages of a laborer," within a statute exempting the latter from attachment: Hamberger v. Marcus (1893), 157 Pa. 133, 27 Atl. 681, 37 Am. St. R. 719. See also Wildner v. Ferguson (1889), 42 Minn. 112, 43 N. W. 794; 18 Am. St. R. 495; 6 L. R. A. 338.

In Tete v. Lanaux (1893), 45 La. Ann. 1343, 14 So. 241, there was a necessity, in view of a peculiar statute, to determine whether a certain person was a *clerk*, or a *broker*. Said the court: "A clerk is one who hires his services to an employer at a fixed price under a stipulation to do and perform some specific duty or labor which requires the exercise of skill. 'The broker is he who is employed *to negotiate a matter between two parties*, and who for that reason is the mandatory of both.' R. C. C. 3016. The leading and essential difference between a clerk and a broker is that the former hires his services exclusively to one person, while the latter is employed to make bargains and contracts between other persons in matters of trade, commerce and navigation. For the services of the former there is a fixed stated salary, while for the latter a compensation, commonly styled brokerage, is allowed."

[12] Richmond v. Sitterding (1904), 101 Va. 354, 43 S. E. 562; 99 Am. St. R. 879, 65 L. R. A. 445, with elaborate *Note*. See, Brackett v. Lubke (1862), 4 Allen (Mass.) 138, 81 A. Dec. 694; Jensen v. Barbour (1895), 15 Mont. 582, 39 Pac. 906; Casement v. Brown (1893), 148 U. S. 615, 13 Sup. Ct. 672, 37 L. Ed. 582; Reedie v. London, etc. Ry. Co. (1849), 4 Exch. 244, Wambaugh's Cases on Agency 134; Lawrence v. Shipman (1873), 39 Conn. 586, Wamb. Cas. 210. The typical case is that of the building contractor who

pensation will be a "lump" or fixed sum, rather than the aggregate of amounts apportioned in proportion to the various items or units of the work. The "cost plus" method of payment is also common. These characteristics may, to some extent, be modified by the contract of the parties without altering the relation.

As will be seen in a later section[13] the independent contractor is ordinarily neither the agent nor the servant of the employer and therefore has usually no authority or power to subject his employer to liability either in contract or in tort, though there are exceptional cases in which the employer will be liable.

The servants employed by the independent contractor are usually not the servants of the employer of the contractor.

§ 21. Agency differs from trust.—Agency differs in material respects from the ordinary trust.[14]

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undertakes to construct a building, a bridge, a railway, etc., according to agreed plans and specifications, supplying the labor and materials, for a fixed sum; but there may be many other cases falling within the same principle.

In a case wherein a loaded vessel just leaving port was found to be on fire, and the master employed S. & Co., who were doing business as shipping-merchants, to take charge of her and rescue her cargo, the court said: "The employment of S. & Co., under these facts, was something more than the appointment of an agent. It was more in the nature of an employment or hiring than an appointment to an agency. It was in the nature of a contract between the captain of the vessel, as the owner's agent, and S. & Co., whereby the latter agreed to extinguish the fire, and if necessary unload the vessel of its cargo, and do everything else for the protection of the vessel and cargo. They were employed to do a particular thing, and were contractors, instead of agents, in the general understanding of agency." Horan v. Strachan (1890), 86 Ga. 408, 12 S. E. 678, 22 Am. St. R. 471.

As to what is an independent business, compare Brackett v. Lubke, *supra;* Sadler v. Henlock (1855), 4 E. & B. 570, Wamb. Cas. 152; Rait v. New Eng. Furn. Co. (1896), 66 Minn. 76, 68 N. W. 729; Dickson v. Hollister (1888), 123 Pa. 421, 16 Atl. 484, 10 Am. St. R. 533, with Peachey v. Rowland (1853), 13 Com. B. 182; McCarthy v. Second Parish (1880), 71 Me. 318, 36 Am. Rep. 320; Hexamer v. Webb (1886), 101 N. Y. 377, 4 N. E. 755, 54 Am. Rep. 703.

[13] See *post* §§ 506-511.

[14] See Hartley v. Phillips

It is true that agency is often said to be a relation of trust and confidence, and that property in the hands of an agent is often held to be impressed with a trust for the benefit of the principal, yet the two relations are not identical. A trust involves control over property, agency may be totally disconnected with any particular property. The trustee holds a legal title, the agent has usually no title at all. The trustee may act in his own name, the agent acts normally in the name of his principal. Trust is not necessarily a contractual relation; agency as has been seen is properly to be so regarded. A trust does not necessarily or even usually involve any authority to enter into contracts which shall bind another; the authority to make such contracts is the distinguishing characteristic of agency. Trusts are usually not revocable, agency usually is revocable. Other distinctions exist but these are sufficient to mark the contrast.[15]

§ 22. Agency to be distinguished from sale.—Agency is further to be distinguished from sale. Not that the two contracts are not ordinarily readily enough distinguished, but because so many cases arise wherein either through inadvertence or design contracts have been given some of the characteristics of each, and it is necessary to decide which of these characteristics so predominate as to determine the nature of the transaction. A typical case is presented where goods are put into the hands of a person under a contract which in some of its parts seems to treat that person as an absolute purchaser of the

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(1901), 198 Pa. 9, 47 Atl. 929; Knowles v. Scott, [1891] 1 Ch. 717; James v. Smith (1890) 1 Ch. 384; Cleghorn v. Castle (1900), 13 Hawaiian 186; Taylor v. Davis (1884), 110 U. S. 330, 4 Sup. Ct. 147, 28 L. Ed. 163, Goddard's Cas. 10; Shepard v. Abbott (1901), 179 Mass. 300, 60 N. E. 782; Chaffee v. Rutland R. Co. (1881), 53 Vt. 345; Flaherty v. O'Connor (1903), 24 R. I. 587, 54 Atl. 376.

As to a depositary in escrow as an agent of both parties, see Thornhill v. Olson (1915), 31 N. Dak. 81, 153 N. W. 442, L. R. A. 1916A, 493. See also Note, 130 Am. St. Rep. 910.

[15] See, for example, Central Stock Exchange v. Bendinger (1901), 48 C. C. A. 726, 109 Fed. 926, 56 L. R. A. 875.

goods, and in other parts merely as an agent to sell them. No hard and fast rule can be laid down for the determination of these controversies. Names go for very little, and if the parties have made a contract which really operates to transfer the title it must be deemed a sale, even though the parties have expressly declared that it shall be deemed an agency.[16]

§ 23. Agency differs from lease.—So agency may be distinguished from lease. As in the preceding case of sale, the two contracts are usually very much unlike; but, here as there, cases are met with wherein one relation has apparently been disguised under the name of the other. Here as there, also, names are of little consequence, and the true nature of the contract determines the case. If, therefore, though the contract be called a lease, the alleged tenant is so far under the direction and control of the alleged landlord as to make the latter the real party in interest and the former merely his representative, the contract will be held to be one of agency.[17]

In such a case, for example, the relation may be terminated as an agency, and not as a tenancy.

§ 24. The contract creating—"Power of attorney."—The contract by which the relation of principal and agent is created, where such a contract exists, is called a "contract of agency"; the right of the agent to represent the principal is called his "authority" or "power";[18] when the authority is conferred by formal instrument in writing, it is said to be conferred by "letter of attorney," or, more commonly by a "power of attorney." When the authority is conferred by power of attorney, the agent is frequently called an "attorney," or more commonly, an "attorney in fact."[19]

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[16] See Mechem on Sales, §§ 41-49; Ex parte White (1871), L. R. 6 Ch. App. 397; Arbuckle v. Kirkpatrick (1897), 98 Tenn. 221, 39 S. W. 3, 36 L. R. A. 285, 60 Am. St. R. 854; Snelling v. Arbuckle (1898), 104 Ga. 362, 30 S. E. 863, Goddard's Cases 13; Braunn v. Keally (1892), 146 Pa. 519, 23 Atl. 389, 28 Am. St. R. 811; Norwegian Plow Co. v. Clark (1897), 102 Iowa 31, 70 N. W. 808; Taylor v. Burns (1904), 8 Ariz. 463, 76 Pac. 623, Goddard's Cas. 12; Ferry & Co. v. Hall (1914), 188 Ala. 178, 66 So. 104, L. R. A. 1917B, 620 with extended Note.

[17] See Petteway v. McIntyre (1902), 131 N. Car. 432, 42 S. E. 851; State v. Page (1843), 1 Spear (S. Car.) L. 408, 40 Am. Dec. 608; Homan v. Redick (1914), 97 Neb. 299, 149 N. W. 782, L. R. A. 1915C, 601. For discussion whether one is a servant or a tenant, see Bourland v. McKnight (1906), 79 Ark. 427, 96 S. W. 179, 4 L. R. A. (N. S.) 698, with extended Note. Compare Ragsdale v. Meridian Land Co. (1893), 71 Miss. 284; 14 So. 193.

§ 25. Classification of agencies—Actual or ostensible.—Agencies are sometimes classified as *actual* or *ostensible*. According to this classification, the agency is actual when the agent has really been employed and authorized by the principal; it is ostensible when the principal intentionally, or by want of ordinary care, leads a third person to believe another to be his agent who has not really been employed and authorized by him.[20]

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[18] A distinction is sometimes made between "authority" and "power." An agent may sometimes have it in his "power" to bind the principal although he has no "authority" from his principal so to bind him. In this view, "power" represents what the agent in fact may do; authority, what, as between himself and his principal, he may rightfully do. See Professor Warren A. Seavey, in 29 Yale Law Journal, 859. It is substantially the distinction sometimes drawn (*post* § 228) between authority and instructions, or between power and right. In common usage, however, "power" and "authority" are treated as practically synonymous.

[19] If an agent is called upon to execute a deed, he signs it, "John Smith," as principal, "by Richard Roe, his attorney," or, more commonly, "his attorney in fact"; he may say, "agent." The words, "attorney in fact," are used chiefly to distinguish him from an attorney at law.

[20] This distinction is one which is made in the Code of California, and has been adopted by several of the other States in enacting their Codes.

A man is an actual agent when he really has been employed, but he is an ostensible agent when the principal, either intentionally or by want of ordinary case, has held him out as though he were agent, although he had never in fact been appointed. So far as third persons are concerned, it usually makes no difference whether the agency is actual or ostensible. If one person causes another reasonably to believe, and to act upon the belief, that a cer-

§ 26. —— Universal, general and special agency.— Agencies may also be classified either according to the extent of the authority conferred or according to the extent of the acts or business to be done. While the former basis would seem the more logical, the latter is the one which has been generally adopted, although there is not complete harmony in the practice. It is the one which will be adopted here. According to this basis, agencies may be either *universal*, *general* or *special*.

A *universal agent* is one authorized to do all acts for his principal which can lawfully be delegated to an agent.

A *general agent* is one authorized to do all the acts pertaining to a business of a certain kind or at a particular place, or all the acts of a particular class or series.

A *special agent* is one authorized to do some particular act or to act upon some particular occasion.

An agent may be general under this classification although it may happen that he has been given a very restricted authority; and he may be special although it may happen that he was given very general authority as to his acts upon the special occasion in question.[21]

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tain man is his agent, then, so far as that other person is concerned, the assumed agent may be deemed to be agent. The agent practically always knows whether he has been employed, the principal practically always knows. As between themselves there is usually no difficulty. Third persons, however, cannot usually know whether the assumed agent has really been employed or not, but if the principal leads the third person to believe that the man is an agent, then the principal may be bound.

This distinction runs all through the law of agency.

[21] The distinction between the general and the special agent is not always easy to draw, and courts and writers have not agreed upon the basis of it. Judge Story has said: "A special agency properly exists, when there is a delegation of authority to do a single act; a general agency properly exists where there is a delegation to do all acts connected with a particular trade, business or employment." Story on Agency, § 17. Professor Parsons has said: "A general agent is one authorized to transact all his principal's business, or all his business of some particular kind. A particular [special] agent is one authorized to do one or two special things." 1 Parsons on Contracts, *41. Mr. Evans says: "General

§ 27. —— Lower in rank, as a contractual negotiator, is the mere *messenger* who is employed to carry word, either oral or written, of the conclusions at which his principal has arrived.

agents are such as are authorized to transact all business of a particular kind; whilst a special agent is authorized to act only in a single transaction." Evans on Agency (Ewell's ed.) p. 2.

Mr. Wright says that the general agent "is usually a person to whom the principal has entrusted the management of a particular business, such as an estate agent, or the manager of a business; while the special agent is an agent given authority to deliver a particular message or buy a particular thing on one occasion, or do some special thing, and has no implied authority *aliunde* from his position or the nature of his business." Wright on Principal and Agent, 2d ed. 87, 88.

Something of the distinction may be made clear by an illustration. If I have a business which I cannot conduct in person, I may employ an agent to manage it for me. In the very nature of the case, however, in conferring his authority, I must do so in general terms. I cannot easily do more than to empower him to manage it according to his best judgment for my best interest. I cannot well go into details and prescribe how he shall conduct himself and what he shall do in all the multitudinous contingencies which may arise. I must give him authority in general terms and leave the details to his discretion. On the other hand, if I need a horse, I may send a person into the market to buy one only on condition that it shall be of the age, size, color, weight, disposition, speed and price which I prescribe. This case admits of special and particular instructions; the other did not. The former, the business manager, would be a general agent. The latter, who is to buy the horse, would be a special agent. But suppose I say to an agent, "Go into the market and buy me a horse," and limit him neither as to age, size, color, price or otherwise. What kind of an agent is he? He has general authority, but is to act only on a particular occasion.

Formerly very important results were made to flow from this distinction; but the modern tendency is to minimize it, if not to ignore it altogether.

See Butler v. Maples (1869), 9 Wall. (U. S.) 766, 19 L. Ed. 822, Mechem's Cas. Ag. 340; Loudon Savings Fund Society v. Hagerstown Savings Bank (1860), 36 Pa. St. 498, 78 Am. Dec. 390, Mechem's Cas. 371; Reinhard's Cas. 107; Gibson v. Snow Hardware Co. (1891), 94 Ala. 346, 10 So. 304, Goddard's Cas. 19; Wood v. McCain (1845), 7 Ala. 800, 42 Am. Dec. 612, Reinhard's Cas. 11; Terre Haute, etc. R. Co. v. McMurray (1884), 98 Ind. 358, 49 Am. Rep. 752, Rein. Cas. 192; Whitehead v. Tuckett (1812), 16 East 400, Wambaugh's Cas. 277

His case has been very little considered in English law. A servant sent upon a special errand is also often called a messenger.

Still lower in rank is the person used for a mere mechanical act, as where I employ one to write my name for me, in my presence and under my direction, when I have personally performed all of the parts involving discretion, negotiation or determination to act.

§ 28. —— **How many of each may principal have.**—It has been said that a principal can have but one universal agent, and it has been doubted whether such an agency could practically exist. It can, it is said, be created, if at all only by clear and unambiguous language, and it will not be inferred from any general expressions, however broad.[22]

§ 29. —— A principal may have several general agents and as many special agents as occasion may require.

§ 30. —— The same person may at one time or in regard to one transaction be a special agent of his principal and at another time or in reference to other transactions he may be a general agent. So, though he may be authorized to act only in a particular case he may, as has been seen, with respect of that transaction, have general authority.[23]

§ 31. —— **How nature of the agency to be proved.**—Whether an agency is general or special is usually a fact to be proved. The law itself makes no abstract presumption in reference to it, though when an agency is once shown to exist, it is said that the law will presume it general rather than special.[24] It would, at least, be difficult in the absence of any proof to presume that any particular limitations upon the authority existed, other than those which naturally and ordinarily would apply in such a case.

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[22] See Gulick v. Grover (1868), 33 N. J. L. 463, 97 Am. Dec. 728, Rein. Cas. 109; Barr v. Schroeder (1867), 32 Cal. 609; Wood v. McCain (1845), 7 Ala. 800, 42 Am. Dec. 612, *supra*.

[23] See Jeffrey v. Bigelow (1835), 13 Wend. (N. Y.) 518, 28 Am. Dec. 476.

[24] See Trainer v. Morison (1886), 78 Me. 160, 3 Atl. 185, 57 Am. Rep. 790; Austrian v. Springer (1892), 94 Mich. 343; 54 N. W. 50, 34 Am. St. R. 350; Oak Leaf Mill Co. v. Cooper (1912), 103 Ark. 79, 146 S. W. 130.

§ 32. —— Professional and non-professional agents.— Agents may further be classified as *professional* and *non-professional.*

Of the professional agents, the most important are the *attorney at law*, the *auctioneer*, the *broker* and the *factor.*

§ 33. —— The *attorney at law* is one whose profession it is to give advice and assistance in legal matters, and to prosecute and defend in the courts the causes of those who may employ him for that purpose.

§ 34. —— The *auctioneer* is one whose business it is to sell or dispose of property, rights or privileges, at public competitive sale, to the person offering or accepting the terms most favorable to the owner.

§ 35. —— The *broker* is one whose business it is to bring parties together to bargain, or to bargain for them, in matters of trade, commerce or navigation. Brokers are of many kinds, such as merchandise brokers, stock-brokers, insurance brokers, real estate brokers, and the like.

§ 36. —— The *factor* is one whose business it is to receive and sell goods for a commission. He is often called a *commission-merchant.* If he guarantees payment for the goods he sells, he is said to act under a *del credere* commission. When authorized to sell a cargo which he accompanies on the voyage, he is called a *super-cargo.*

§ 37. —— Distinctions between these classes of agents.— These various classes of agents differ materially from each other. Thus the *auctioneer* is employed to sell or dispose of only, and not to buy, and his sales are always public. He is primarily the agent of the seller only, but he becomes the agent of the buyer also when he accepts his bid and enters his name upon the memorandum of the sale.

§ 38. —— The *broker* sells at private sale, and has not usually the possession of the goods or property which he sells. He is regarded as the agent of the person who first employs him, and he can not represent both parties to the transaction unless with full knowledge of his relations to the other each principal sees fit to confide his interests to him. The broker acts properly in the name of his principal only, and he has not usually any property in his possession upon which he could claim a lien.

§ 39. —— The *factor* is entrusted with the possession of the goods, and sells usually in his own name. Unlike the auctioneer, his sales are private. The factor has a special property in the goods, a lien upon them for his advances and charges, and, unless restricted, may sell upon a reasonable credit.

Each of these different classes of agents will be more fully considered hereafter.

CHAPTER III.

FOR WHAT PURPOSES AGENCY MAY BE CREATED.

§ 40. The general rule.
41. The general exceptions.
42. The first exception.
43, 44. —— Illustrations.
45. The second exception.
46. —— How these cases regarded in law.
47-50. —— Illustrations.
51. —— Validity as between principal and agent.
52. —— How when contract illegal in part.
53. —— Validity as between principal and third party.

§ **40. The general rule.**—It is the general rule that agency may be created for the transaction of any lawful business, and that whatever a person may lawfully do, if acting in his own right and in his own behalf, he may lawfully delegate to an agent.[1]

This is, in general, as true of an act authorized or required by statute, as of any other kind of acts.[2] An exception based upon the language of the statute will be referred to presently.

In the case of principal and agent, the thing to be done will usually be a piece of *business;* in the case of master and servant it will usually be a piece of *work.*

§ **41. The general exceptions.**—The cases in which agency cannot lawfully be created (meaning by that employments whose contractual obligations the courts will not enforce), fall mainly into one or the other of two general classes:

I. Agency cannot lawfully be created for the performance of an act which from its nature, or the terms of the law requiring it, can only properly be performed by the principal in person. The rule in this class of cases is sometimes stated in this way: that authority cannot be delegated for the performance of a purely personal act or duty.

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[1] See Combes' Case (1613), 9 Coke 75a, Goddard's Cas. 35; Wambaugh's Cas. 33; Silverwood v. Latrobe (1888), 68 Md. 620, 13 Atl. 161, Goddard's Cas. 33.

[2] See *In re* Whitley Partners (1886), 32 Ch. Div. 337, Wambaugh's Cas. 39.

II. Agency cannot lawfully be created to do an act which is illegal, immoral or opposed to public policy.

§ 42. **The first exception.**—It is a general rule that a personal duty, trust or confidence imposed upon one person cannot be delegated by him to another. So, "if a public duty or trust is imposed on anyone, these, not being things which one does in his own right, cannot be delegated, but must be performed personally." It is this principle which creates the limitation, hereafter to be considered, upon the power of an agent to delegate his agency. But the same rule may operate in some cases upon the principal, and it prevents him from delegating to an agent those things which by statute, custom or the inherent nature of the act are required to be done by him in person.[3]

§ 43. —— **Illustrations.**—Thus, for example, upon the most obvious considerations of sound policy and the nature of the privilege, an elector who is entitled to vote at a public election must do so in person, and can not vote by agent in the absence of some express provision authorizing it.[4] And where a statute required an affidavit to be made, concerning matters peculiarly within the knowledge of a certain person it was held that he must make the affidavit himself, and that one made by an agent would not suffice.[5]

So upon the ground that it involved personal judgment and discretion, it has been held that power to make, under a statute, a general assignment for the benefit of creditors can not be delegated to an agent, the court saying: "Where an act authorized by statute must, from its nature or the necessary construction of the statutory authority, be done in person— for example, the statute authorizing a party to make his will—the power to do the act cannot be delegated. Such cases fall within the exception to the general rule that a person may authorize another to dispose of his property for him in any manner he himself may do.''[6]

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[3] See United States v. Bartlett (1839), 2 Ware (Dav. 9) 17, 24 Fed. Cas. p. 1021; Combes' Case, *supra*.

[4] Statutes do now sometimes provide for some cases of this sort.

[5] See Mechem on Public Officers, § 187.

§ 44. —— The form of the statute providing for the act may also require a similar holding. Thus, where some portions of the statute provide for the doing of an act by a party ''or his agent,'' while other portions of the same statute as to other acts say nothing about an agent, the statute would ordinarily be construed as excluding agency in the latter cases.[7] The same principle might be applied under different statutes, even if adopted at different times, if there was such evidence of legislative care and precision in drafting, and of unity and continuity of purpose, as to justify the court in saying that the omission to provide for agency in any case fairly showed an intention to exclude it.[8] The cogency of such inferences obviously diminishes rapidly with differences in time, circumstance, and coherence of legislative intention.

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[6] See United States v. Bartlett, *supra; In re* Roukous (1904), 128 Fed. 648.

[7] See Minneapolis Trust Co. v. School District (1897), 68 Minn. 414, 71 N. W. 679. The court further said: "We are not to be understood as holding that the physical act of signing the debtor's name to the deed of assignment must be his personal act, but we do hold that he must personally exercise the statutory authority of making an assignment, and that he cannot delegate to an attorney in fact the power to decide for him when an assignment shall be made, or to determine and declare his insolvency, or to select for him an assignee who shall take possession of his property for his creditors. These are matters as to which the debtor must exercise his personal judgment. It would lead to grave abuses if a business man could execute to a favored creditor, or to the attorney or agent of such creditor, a continuing power of attorney to put him into insolvency, select an assignee, and turn over his property to such assignee, at any time, at the pleasure of the attorney."

Same holding as to acknowledgment of plats in Illinois; Gosselin v. Chicago (1882), 103 Ill. 623; Thompson v. Maloney (1902), 199 Ill. 276, 65 N. E. 236, 93 Am. St. R. 133.

[8] So held in Hyde v. Johnson (1836), 2 Bing. N. C. 776, Wambaugh's Cas. 37.

§ 45. **The second exception.**—Under the second head the rule is, that the law will not enforce the performance of an agency which has for its purpose, or which naturally and directly tends to promote, the commission of an act which is either illegal or immoral in itself, or which is opposed to public policy.

It may be thought at first view that this is not an exception to the rule at all—that the principal himself could not do any of the acts which are so condemned. This, of course, might be true of certain of them, but there are still many cases wherein one might, with impunity, act in person, because, in the absence of a statute, there might not be any way of reaching him, but could not effectively appoint an agent to act for him because, while the court might not be able to reach the parties directly, it could at least refuse to enforce the contract if either party sought its aid. Thus, for example, one may very frequently resort to personal persuasion to procure legislation, or obtain a contract or a pardon by personal influence, and incur thereby no legal penalty, because no express statute has made it an offense. Such practices, however, are undesirable, because they tend to substitute personal influences for considerations of the public good. They are opposed to public policy, and though the law may not reach the parties directly, it will at least refuse to lend its aid to enforce their contracts for the doing of such acts.

§ 46. —— **How these cases regarded in law.**—The law scrutinizes undertakings of this nature with great strictness, and judges of their validity by their general nature and natural and probable results. It makes no difference that in the particular case nothing improper was done or intended to be done. The law determines the case by the tendency of undertakings of that kind, and holds the particular contract unlawful if its general nature brings it within the prohibited class.[9]

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[9] See Hazelton v. Sheckells (1906), 202 U. S. 71, 26 Sup. Ct. 567, 50 L. Ed. 939; Houlton v. Nichol (1896), 93 Wis. 393, 67 N. W. 715; Houlton v. Dunn (1895), 60 Minn. 26, 61 N. W. 898, 30 L.

In some courts, conspicuously the Supreme Court of the United States, the fact that compensation was contingent upon success, thereby offering great temptation to the use of improper means, is an additional reason for condemning the contract.[10]

§ 47. —— **Illustrations.**—The cases which fall under this prohibition are exceedingly numerous, but a few classes will be mentioned.

Thus, contracts for employment which lead the agent to put himself into a position wherein his duty to his principal and his own interest may conflict, or wherein his duty to one principal may conflict with his duty to another principal, or which expose him to temptation to violate his duty to his principal, are opposed to good morals and sound policy, and the courts will not enforce them.[11] Clearly so would be an employment to endeavor to bribe or corrupt the agent of another.[12]

§ 48. —— So, while open, avowed, and public advocacy of men or measures, upon their merits, before boards, heads of departments, legislative bodies or appointing officers, is unobjectionable and frequently desirable,[13] private "button-holing," "lobbying," or "log-rolling" for men or measures, not on their merits, but because of personal friendship, political obligation, social or fraternal considerations, and the like, is highly undesirable and opposed to sound policy; and while employments for advocacy of the first sort are valid, employments for the persuasion or influencing of the second sort will not be enforced.

R. A. 737; Harrington v. Victoria Dock Co. (1878), 3 Q. B. Div. 549.

[10] See Providence Tool Co. v. Norris (1864), 2 Wall. (U. S.) 45, 17 L. Ed. 868; Spalding v. Ewing (1892), 149 Pa. 375, 24 Atl. 219, 34 Am. St. R. 608, 15 L. R. A. 727.

[11] See Rice v. Wood (1873), 113 Mass. 133, 18 Am. Rep. 459, Mechem's Cas. 12; Atlee v. Fink (1882), 75 Mo. 100, 43 Am. Rep. 385, Mechem's Cas, 14; Byrd v. Hughes (1876), 84 Ill. 174, 25 Am. Rep. 442, Mechem's Cas. 23.

[12] See Woodstock Iron Co. v. Richmond etc. Co. (1888), 129 U. S. 643, 9 Sup. Ct. 402, 32 L. Ed. 819; Lum v. McEwen (1894), 56 Minn. 278, 57 N. W. 662; Boyd v. Cochrane (1897), 18 Wash. 281, 51 Pac. 383; Harrington v. Victoria Dock Co. (1878), 3 Q. B. Div. 549.

[13] See Winpenny v. French (1869), 18 Ohio St. 469.

Illustrations of the latter sort are employments to procure or to suppress legislation by bringing personal influence to bear upon the legislators;[14] to procure action on the part of municipal bodies by direct persuasion or personal influence;[15] to procure contracts from governments and heads of governmental departments by like influences;[16] to procure pardons by like means;[17] to secure appointment to public or private office, by personal solicitation or influence;[18] to procure election to public or private office by improper means;[19] and the like.

[14] See Mills v. Mills (1869), 40 N. Y. 543, 100 Am. Dec. 535, Mechem's Cas. 17; Spalding v. Ewing (1892), 149 Pa. 375, 24 Atl. 219, 15 L. R. A. 727, 34 Am. St. R. 608; Houlton v. Dunn (1895), 60 Minn. 26, 61 N. W. 898, 30 L. R. A. 737, 51 Am. St. R. 493; County of Colusa v. Welch (1898), 122 Cal. 428, 55 Pac. 243; Clippinger v. Hepbaugh (1843), 5 W. & S. (Pa.) 315, 40 Am. Dec. 519, Reinhard's Cas. 61; Trist v. Child (1874), 21 Wall. (U. S.) 441, 22 L. Ed. 623, Goddard's Cas. 43.

[15] See Hayward v. Nordberg M'f'g. Co. (1898), 85 Fed. 4, 29 C. C. A. 438; Hyland v. Oregon Paving Co. (1914), 74 Oreg. 1, 144 Pac. 1160, L. R. A. 1915C, 823, Ann. Cas. 1916E, 941; Crichfield v. Bermudez Paving Co. (1898), 174 Ill. 466, 51 N. E. 552, 42 L. R. A. 347.

[16] See Hazelton v. Sheckells (1906), 202 U. S. 71, 26 Sup. Ct. 567, 50 L. Ed. 939; Stanton v. Embrey (1876), 93 U. S. 548, 23 L. Ed. 983, Mechem's Cas. 631; Elkhart County Lodge v. Crary (1884), 98 Ind. 238, 49 Am. Rep. 746, Mechem's Cas. Ag. 18, Reinhard's Cas. 66; Beal v. Polhemus (1887), 67 Mich. 130, 34 N. W. 532; Weed v. Black (1875), 2 McArth. (9 D. C.) 268, 29 Am. Rep. 618; Garman v. United States (1899), 34 Ct. of Cl. 237; Wasserman v. Sloss (1897), 117 Cal. 425, 49 Pac. 566, 59 Am. St. R. 209, 38 L. R. A. 176; Commonwealth v. Press Co. (1893), 156 Pa. 516, 26 Atl. 1035; Lyon v. Mitchell (1867), 36 N. Y. 235, 682, 93 Am. Dec. 502, Goddard's Cas. 38.

[17] See Hatzfield v. Gulden (1838), 7 Watts. Pa. 152, 31 Am. Dec. 750, Reinhard's Cas. 71; Deering & Co. v. Cunningham (1901) 63 Kans. 174, 65 Pac. 263, 54 L. R. A. 410; Moyer v. Cantieny (1889), 41 Minn. 242, 42 N. W. 1060.

[18] See Edwards v. Randle (1896), 63 Ark. 318, 38 S. W. 343, 36 L. R. A. 174, 58 Am. St. R. 108; Basket v. Moss (1894), 115 N. C. 448, 20 S. E. 733, 44 Am. St. R. 463, 48 L. R. A. 842; West v. Camden (1890), 135 U. S. 507, 10 Sup. Ct. 838, 34 L. Ed. 254; Wilbur v. Stoepel (1890), 82 Mich. 344, 46 N. W. 724, 21 Am. St. R. 568.

[19] See Roby v. Carter (1894), 6 Tex. Civ. App. 295, 25 S. W. 725; Dansereau v. St. Louis (1890), 18 Can. S. Ct. R. 587; Dickson v. Kittson (1899), 75 Minn. 168, 77 N. W. 820, 74 Am. St. R. 447.

§ 49. —— Similarly, endeavors to interfere with the regular and orderly administration of justice by the established tribunals, are pernicious in their tendency; and so are efforts to foment, encourage or support litigation by persons not interested in the controversy and for their personal gain. Employments, therefore, to procure the suppression or defeat of public prosecutions by other than the open and legally established methods of procedure, are objectionable;[20] and so are employments,—not to discover actual and existing evidence,—but to produce evidence, or to secure witnesses who will testify to the necessary facts, or to suppress evidence.[21] Contracts, also, by an attorney at law to prosecute, at his own expense, actions to recover lands in which he had no interest, present or contingent, in consideration of receiving a portion of what he may recover, have been held to be opposed to public policy;[22] and so has a contract by a person, not otherwise interested, to procure the employment of an attorney by a prospective litigant, in consideration of receiving a share of the attorney's fees.[23]

§ 50. —— Within the same category are employments to deal in prohibited articles, or to engage in forbidden occupations,[24] or generally to do acts in violation of statutes.[25]

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[20] See Weber v. Shay (1899), 56 Ohio St. 116, 46 N. E. 377, 60 Am. St. R. 743, 37 L. R. A. 230; Kirkland v. Benjamin (1900), 67 Ark. 480, 55 S. W. 840.

[21] See Lyon v. Hussey (1894), 82 Hun 15, 31 N. Y. S. 281, 63 N. Y. St. R. 531; Kennedy v. Hodges (1895), 97 Ga. 753, 25 S. E. 493; Quirk v. Muller (1894), 14 Mont. 467, 36 Pac. 1077, 43 Am. St. R. 647, 25 L. R. A. 87; Crisup v. Grosslight (1890), 79 Mich. 380, 44 N. W. 621.

[22] See Peck v. Heurich (1896), 167 U. S. 624, 42 L. Ed. 302, 17 Sup. Ct. 927.

[23] See Alpers v. Hunt (1890), 86 Cal. 78, 24 Pac. 846, 21 Am. St. R. 17, 9 L. R. A. 483; compare Vocke v. Peters (1895), 58 Ill. App. 338.

[24] See Sullivan v. Horgan (1890), 17 R. I. 109, 20 Atl. 232, 9 L. R. A. 110; Helber v. Schantz (1896), 109 Mich. 669, 67 N. W. 913; Mexican International B'k'g Co. v. Lichtenstein (1894), 10 Utah 338, 37 Pac. 574.

[25] See Irwin v. Curie (1900), 56 N. Y. App. Div. 514, 67 N. Y. S. 380; Dudley v. Collier (1888), 87 Ala. 431, 6 So. 304, 13 Am. St. R. 55; Parks v. Jacob Dold Packing Co. (1894), 6 Misc. 570, 27 N. Y. S. 289, 57 N. Y. St. R. 788;

"Marriage brokerage" contracts, or employments to procure a marriage for a commission or other similar compensation, are opposed to public policy;[26] and so are employments to deceive and defraud the public, like undertaking to procure fictitious sales to deceive intending purchasers, or to market worthless and cheating articles like "Bohemian Oats."[27]

Opposed to public policy, further, are employments to create "corners" and monopolistic combinations;[28] or to engage in stock gambling transactions or similar unlawful dealings in commodities or merchandise.[29]

Employments to carry on "book-making" or other gambling transactions, are in the same class.[30]

§ 51. —— Validity as between principal and agent.—But to make these contracts invalid as between the principal and the agent, it is necessary that the agent shall have participated in the unlawful intent of the principal, or shall knowingly have assisted in giving it effect. An innocent agent may usually recover his compensation or reimbursement from the principal,[31] though occasionally a statute makes the actual innocence

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Lowey v. Granite Association (1894), 8 Misc. R. 319, 28 N. Y. S. 560, 59 N. Y. St. R. 246.

[26] See Duval v. Wellman (1891), 124 N. Y. 156, 26 N. E. 343; Morrison v. Rodgers (1896), 115 Cal. 252, 46 Pac. 1072, 56 Am. St. R. 95; Hellen v. Anderson (1898), 83 Ill. App. 506.

[27] See McDonnell v. Rigney (1896), 108 Mich. 276, 66 N. W. 52; Merrill v. Packer (1890), 80 Iowa, 542, 45 N. W. 1076; Shipley v. Reasoner (1890), 80 Iowa, 548, 45 N. W. 1077; McNamara v. Gargett (1888), 68 Mich. 454, 36 N. W. 218, 13 Am. St. R. 355.

[28] See Leonard v. Poole (1889), 114 N. Y. 371, 21 N. E. 707, 11 Am. St. R. 667, 4 L. R. A. 728; Samuels v. Oliver (1889), 130 Ill. 73, 22 N. E. 499.

[29] See Kahn v. Walton (1889), 46 Ohio St. 195, 20 N. E. 203; Wagner v. Hildebrand (1898), 187 Pa. St. 136, 41 Atl. 34; Dows v. Glaspel (1894), 4 N. Dak. 251, 60 N. W. 60; Embrey v. Jemison (1889), 131 U. S. 336, 9 Sup. Ct. 776, 33 L. Ed. 172; Cashman v. Root (1891), 89 Cal. 373, 26 Pac. 883, 12 L. R. A. 511, 23 Am. St. R. 482.

[30] See Central Trust Co. v. Respass (1902), 112 Ky. 606, 66 S. W. 421, 99 Am. St. R. 317, 56 L. R. A. 479; Keen v Price [1914], 2 Ch. 98.

[31] See Irwin v. Williar (1883), 110 U. S. 499, 510, 4 Sup. Ct. 160, 28 L. Ed. 225.

of one party insufficient to save the contract.[32]

The question of accounting between the parties in these cases is usually governed by the question whether enforcing the demand involves an enforcement of the unlawful contract. If so, relief will not be given; otherwise it may be.[33]

§ 52. —— **How when contract illegal in part.**—Where contracts of this nature are entire, that is, where the mutual agreements are so connected and mutually dependent that one part can not stand without the others, the whole contract will be rendered unenforceable by the illegality; but if the contract is severable, the invalid part may be rejected and the residue be given effect.[34]

§ 53. —— **Validity as between principal and third party.**—Although the contract of employment as between the principal and his agent might be unenforceable, it might nevertheless be the case that a contract made by the agent with a third person, in pursuance of such employment and authorization, could be enforced by such third person. Thus, a contract made by the agent for the purchase of goods from an innocent third person would not usually be affected by the fact that the principal was acting in pursuance of an unlawful purpose to "corner" the market.

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[32] See Elmore-Schultz Grain Co. v. Stonebraker (1919), 202 Mo. App. 81, 214 S. W. 216; McGrew v. City Produce Exchange (1887), 85 Tenn. 572, 4 S. W. 38, 4 Am. St. R. 771.

[33] See *post* § 336; Central Trust Co. v. Respass, *supra;* McMullen v. Hoffman (1899), 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117, explaining Brooks v. Martin (1863), 2 Wall. (U. S.) 70, 17 L. Ed. 732; Kennedy v. Lonabaugh (1911), 19 Wyo. 352, 117 Pac. 1079, Ann. Cas. 1913E, 133; Citizens' Bank v. Mitchell (1909), 24 Okla. 488, 103 Pac. 720, 20 Ann. Cas. 371.

If illegality was ended, and the transaction in question was a new one, not affected by it: Mitchell v. Fish (1911), 97 Ark. 444, 134 S. W. 940, 36 L. R. A. (N. S.) 838.

Compare Vincent v. Moriarity (1898), 31 N. Y. App. Div. 484.

[34] See Kennedy v. Lonabaugh, *supra.*

CHAPTER IV.

WHO MAY BE PRINCIPAL OR AGENT.

§ 54. In general.

1. Who may be Principal.

55. The general rule.
56. Rule applies to corporations public and private.
57. —— To partnerships.
58. Natural or legal incapacity.
59, 60. Insane persons as principals.
61, 62. Infants as principals.
63-65. Married women as principals.

2. Who may be the Agent.

66. Less capacity required in agent than in principal.
67. Infant as agent.
68. —— How authorized.
69. Infant as servant.
70. Married women as agent.
71. —— As agent for her husband.
72. Husband as agent for his wife.
73. Corporation as agent.
74. Partnership as agent.
75. Disqualification by adverse interest.
76. Disability from lack of professional standing.

3. Joint Principals.

77. Agent may have several joint principals.
78. Partners, co-tenants, etc., as principals.
79. Clubs, societies, etc., as principals.

4. Joint Agents.

80. Several agents may jointly represent same principal.
81. Where authority is joint and several.
82. Where agency is created by law.
83. Liability for each other's acts.

§ 54. **In general.**—Attention will next be given to the general question, Who may be principal or agent? And as a not inappropriate part of the same general subject, the questions which arise where several persons are jointly to be the principals or the agents, will be here considered.

1. *Who may be Principal.*

§ 55. **The general rule.**—It is the general rule that every person, who is competent to act in his own right and in his own behalf, may act by agent. We have seen also that as a general rule a person may do by agent whatever he may do in person. The reverse of this is also true in general, viz.:—that a person who is incompetent to act in his own right and in his own behalf cannot act by agent; neither can one do by agent what he cannot do in person.

Speaking of agency proper, that is, of agency as a means of creating or affecting contractual relations, it is obvious that a person who has no contractual capacity can have no need of an agent; and that generally one who has such contractual capacity may act by agent.

§ 56. Rule applies to collections of persons—Corporations public and private.—The general rule applies to collections of persons as well as to single individuals. Hence, within the sphere of their chartered powers, private corporations may, and, from their nature, must usually act by agents; and the existence of the agency and the effect of the agent's acts are subject to the same rules which apply to individuals.[1] Thus it is said in a recent case, "It is well settled that a corporation may contract and be contracted with through an agent whose authority may be implied from facts and circumstances showing recognition or ratification by the corporation. Indeed, it seems that the same presumptions are applicable in this respect to corporations as to natural persons."[2]

In the same way, public corporations, such as states, cities and towns, having authority to act in a matter for which no regular officer or public agent has been provided, may act by an agent specially appointed for that purpose.[3]

§ 57. —— Partnerships.—So partnerships may, unless restricted, appoint agents to perform the acts which are within the scope of the partnership business.[4]

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[1] See Moyer v. East Shore Terminal Co. (1894), 41 S. Car. 300, 19 S. E. 651, 44 Am. St. R. 709, 25 L. R. A. 48; St. Andrews Bay Land Co. v. Mitchell (1851), 4 Fla. 192 54 Am. Dec. 340, Mechem's Ag. Cas. 26; Kitchen v. Railroad Co. (1875), 59 Mo. 514, Reinhard's Cas. 34; Washburn v. Railroad Co. (1859), 3 Head (Tenn.) 638, 75 Am. Dec. 784.

[2] Moyer v. East Shore Terminal Co., *supra.*

[3] See Hall v. Wisconsin (1880), 103 U. S. 5, 26 L. Ed. 302; State v. Torinus (1879), 26 Minn. 1, 49 N. W. 259, 37 Am. St. R. 395; Davis v. Commonwealth (1895), 164 Mass. 241, 41 N. E. 292, 30 L. R. A. 743.

The rule applies to limited partnerships as well as to ordinary partnerships.[5]

§ 58. Natural or legal incapacity.—Incapacity to be a principal, in the case of natural persons, may be either natural or legal. It is natural where it inheres in the very nature, character or situation of the person, as in the case of insane persons, very young infants, and the like. It is legal where it results merely from the operation of some arbitrary and perhaps temporary law, as in the case of married women at the common law, or of the infant who has nearly but not quite reached the age which may be fixed for his majority.

A great many causes and forms of legal incapacity have, at different times, been recognized by law.[6] The most important and common in modern times are those based upon mental capacity, age, and marriage, as in the case of the insane person, the infant, and the married woman.

§ 59. Insane persons as principals.—Insane persons and other persons who, from unsoundness of mind,[7] are incompetent to make contracts, are usually likewise incompetent to act by agent.[8]

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[4] See Lucas v. Bank of Darien (1830), 2 Stew. (Ala.) 280, Mechem's Cas. 27; Clarke v. Slate Valley R. Co. (1890), 136 Pa. 408, 20 Atl. 562, 10 L. R. A. 238.

[5] See Park Bros & Co. v. Kelly Axe Mfg. Co. (1892), 49 Fed. 618, 6 U. S. App. 26, 1 C. C. A. 395.

[6] Professor Holland, Jurisprudence, 10th ed. p. 340, enumerates sixteen forms which various legal systems have recognized.

[7] Any brief but comprehensive statement of the law upon this subject is difficult if not impossible. Mental unsoundness may be of every degree from the slightest to the most complete; it may be temporary or permanent; it may be open and obvious or so obscure as not to be discoverable in ordinary dealings; it may have existed from birth or be the product of accident, disease or senility; it may have been adjudicated upon by a court of competent jurisdiction, or it may have not yet been passed upon; if ordinarily present there may be lucid intervals. Many different phases are recognized, and different names are applied, such as idiocy, lunacy, imbecility, dementia, etc.

If the person has been, in due form, judicially declared to be insane, his later contractual dealings, whether in person or through an agent, are usually deemed to be void.[9] If he has not been so adjudicated, such dealings are usually held to be voidable only,[10] though some cases have treated his power of attorney to confess judgment or to convey land as void.[11]

But if there has been no adjudication of insanity, and if the incapacity was not known to the other party, who has acted in good faith and taken no advantage of it, an executed contract will usually not be set aside unless the other party can be restored to his original condition.[12]

§ 60. —— The contract of employment, as between the insane person and the agent or servant is doubtless subject to the same rules as the contracts with third persons.

While an insane person, through his estate, is ordinarily answerable for his own torts, he is not so responsible ordinarily for the torts of his servant hired by him while insane, or for the torts of his guardian or committee or of servants employed by such guardian or committee.[13]

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[8] See Stead v. Thornton (1832), 3 B. & Ad. 357 (n.), Wambaugh's Cas. 15; Tarbuck v. Bispham (1836), 2 M. & W. 2; Yonge v. Toynbee [1910], 1 K. B. 215; McLaughlin v. Daily Telegraph Co. (1904), 1 Australian Com. L. R. 243; McLaughlin v. City Bank (1909), 9 New South Wales State Rep. 319; Dexter v. Hall (1872), 82 U. S. (15 Wall.) 9, 21 L. Ed. 73, Reinhard's Cas. 27; Plaster v. Rigney (1899), 97 Fed. 12, 38 C. C. A. 25; McClun v. McClun (1898), 176 Ill. 376, 52 N. E. 928; Gillet v. Shaw (1912), 117 Md. 508, 83 Atl. 394, 42 L. R. A. (N. S.) 87; Reams v. Taylor (1906), 31 Utah 288, 87 Pac. 1089, 11 Ann. Cas. 51, 120 Am. St. R. 930, 8 L. R. A. (N. S.) 436; Williams v. Sapieha (1901), 94 Tex. 430, 61 S. W. 115, Goddard's Cas. 26.

[9] See Carter v. Beckwith (1891), 128 N. Y. 312, 28 N. E. 582; American Trust Co. v. Boone (1897), 102 Ga. 202, 29 S. E. 182, 66 Am. St. R. 167, 40 L. R. A. 250.

[10] See Blinn v. Schwarz (1904), 177 N. Y. 252, 69 N. E. 542, 101 Am. St. R. 806; Burnham v. Kidwell (1885), 113 Ill. 425; Jordan v. Kirkpatrick (1911), 251 Ill. 116, 95 N. E. 1079.

[11] See Dexter v. Hall, *supra;* McClun v. McClun, *supra;* Plaster v. Rigney, *supra.*

[12] See Molton v. Camroux (1848), 2 Exch. 487, 4 *id.* 17; McLaughlin v. Daily Telegraph Co., *supra.*

§ 61. Infants as principals.—The infant, in our law, is generally any person under the age of twenty-one years. Different systems have fixed different ages. Our common law permitted some acts, like marriage, to persons of younger age, and statutes not infrequently make similar exceptions, and often distinguish between males and females upon the theory, apparently, that the latter mature earlier than the former.

It was at one time the practice to divide infants' contracts into three classes: void, voidable and valid. The void ones were those which could not possibly be regarded in law as beneficial to the infant; the valid ones were the contracts for "necessaries;" and the voidable class included all others. The modern tendency is to make two classes, voidable and valid. The so-called valid ones, *i. e.*, those for necessaries are probably better classified as *quasi*-contractual.

§ 62. —— The rule has often been laid down, especially in the older cases, that an infant can not appoint an agent, and that any such appointment is *void*. This was particularly true of appointments of agents to sell and convey land or to confess judgment. Such, doubtless, is still the rule most widely prevailing.[14] But the better rule would seem to be that the appoint-

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[13] See Gillet v. Shaw, *supra;* Reams v. Taylor, *supra;* Rooney v. Trust Co. (1908), 61 N. Y. Misc. 159, 114 N. Y. Supp. 612.

[14] See Lawrence v. McArter (1840), 10 Ohio 37, Wambaugh's Cas. 18; Waples v. Hastings (1842), 3 Harr. (Del.) 403, Wambaugh's Cas. 20; Trueblood v. Trueblood (1856), 8 Ind. 195, 65 Am. Dec. 756, Mechem's Cas. 29; *Re* Farley (1914), 213 N. Y. 15, 106 N. E. 756, Ann. Cas. 1916C, 494, L. R. A. 1916D, 816; Fonda v. Van Horne (1836), 15 Wend. (N. Y.) 631, 30 Am. Dec. 77, Reinh. Cas. 15; Casey v. Kastel (1922), 119 N. Y. Misc. 116, 195 N. Y. Supp. 848; Turner v. Bondalier (1888), 31 Mo. App. 582.

As to a power of sale in a mortgage given by an infant, see Askey v. Williams (1889), 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176. As to employment of an attorney to represent him in a legal action, ment is simply voidable, like the infant's ordinary contracts, and that as to those matters, such as the purchase of necessaries, and the like, concerning which the infant might effectively act in person, he may act by agent with similar effect.[15]

With regard to servants—it has been held in England that personal service or attendance may at times be regarded as one of the *necessaries;*[16] but an infant usually would not be liable for the torts of his ordinary hired servants, if he saw fit to repudiate the employment, except where he was so personally controlling the affair that it could be deemed to be his own act.[17]

§ 63. Married women as principals.—Unmarried women, at common law, whether maids or widows, were subject to no legal disabilities, and might therefore have capacity and occasion to act by agent; but the married woman, during the marriage, occupied a radically restricted status. The effect of the marriage was to give to the husband such rights over her property, and to impose upon him such obligations for her acts and contracts, as to leave to her very little room or occasion for independent action. As to the wife's real estate, the husband acquired a freehold interest during their joint lives, and, by the birth of issue, he became tenant for life by the curtesy. Her personal chattels became his absolutely, and her choses in action

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see Beliveau v. Amoskeag Co. (1895), 68 N. H. 225, 40 Atl. 734, 73 Am. St. R. 577, 44 L. R. A. 167.

See also McDonald v. Spring Valley (1918), 285 Ill. 52, 120 N. E. 476, 2 A. L. R. 1359

[15] See Whitney v. Dutch (1817), 14 Mass. 457, 7 Am. Dec. 229, Reinh. Cas. 18; Simpson v. Prudential Ins. Co. (1903), 184 Mass. 348, 68 N. E. 673, 100 Am. St. R. 560, 63 L. R. A. 741; Hardy v. Waters (1853), 38 Me. 450, Wambaugh's Cas. 22; Coursolle v. Weyerhauser (1897), 69 Minn. 328, 72 N. W. 697; Patterson v. Lippincott (1885), 47 N. J. L. 457, 1 Atl. 506, 54 Am. Rep. 178, Mechem's Cas. 507, Wambaugh's Cas. 514; Johannson v. Gudmendson (1909), 19 Manitoba 83.

[16] See Chapple v. Cooper (1844), 13 M. & W. 252.

[17] See Covault v. Nevitt (1914), 157 Wis. 113, 146 N. W. 1115, Ann. Cas. 1916A, 959, 51 L. R. A. (N. S.) 1092; Robbins v. Mount (1867), 33 How. Pr. (N. Y.) 24, 27 N. Y. Super. Ct. 553.

also became his if he reduced them to possession. Her antenuptial debts, in general, were enforceable against the husband, and her contracts during marriage bound him where made as his agent, if they bound anybody. In such a legal and economic situation, she had neither the capacity nor the occasion to appoint agents.[18]

§ 64. —— In all of our States this common law incapacity has been largely removed by statutes, which usually provide that a married woman may acquire and hold property as her separate estate and may make contracts respecting it, as though she were unmarried; and a married woman may now act by agent in respect to those matters concerning which the statutes have made her competent to act in person.[19] As was said in a recent case, concerning one of these statutes, "these provisions have brushed away many of the disabilities of the wife under the common law; have recognized her individual existence, and conferred upon her distinct rights and powers respecting contracts, the carrying on of business, the owning, controlling and disposing of property, equal to those held and enjoyed by her husband. She is clothed with power to manage her own affairs, and certainly has power to appoint an agent or attorney to do that which she is capable of doing in person."[20]

Where the married woman thus may and does undertake to act by agent, the same rights and liabilities, in general, result as would exist in the case of a man acting in the same way.[21] Notice to her agent is therefore notice to her; his representations may bind her; she may be liable as an undisclosed principal, and the like, under the same circumstances as any other principal.[22]

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[18] See Oulds v. Sansom (1810), 3 Taunt. 261, Wambaugh's Cas. 23; Sumner v. Conant (1836), 10 Vt. 9, Wambaugh's Cas. 24; Henchman v. Roberts (1836), 2 Harr. (Del.) 74, Wambaugh's Cas. 28; Mott v. Smith (1860), 16 Cal. 533, Reinhard's Cas. 21; MacFarland v. Heim (1894), 127 Mo. 327, 29 S. W. 1030, 48 Am. St. R. 629, Goddard's Cas. 24; Dorrance v. Scott (1837), 3 Whart. (Pa.) 309, 31 Am. Dec. 509; Caldwell v. Walters (1851), 18 Pa. St. 79; 55 Am. Dec. 592.

[19] See Weisbrod v. Chicago, etc. Ry. Co. (1864), 18 Wis. 35, 86 Am. Dec. 743, Mechem's Cas. 31, Wambaugh's Cas. 28; Nash v. Mitchell (1887), 71 N. Y. 199, 3 Abb. N. C. 171, 27 Am. Rep. 38, Mechem's Cas. 33; Munger v. Baldridge (1889), 41 Kan. 236, 21 Pac. 159, 13 Am. St. R. 273; Kenton Ins. Co. v. McClellan (1880), 43 Mich. 564, 6 N. W. 88, Rein. Cas. 22; Porter v. Haley (1877), 55 Miss. 66, 30 Am. Rep. 502, Rein. Cas. 23.

[20] Munger v. Baldridge, *supra.*

§ 65. —— At common law the married women was as incapable of hiring a servant of her own as she was of appointing an agent,[23] but under these modern statutes she may have servants in the business which she carries on as freely as she may have agents, and with the same effect.

As will be seen in a later section[24] where a married woman may act by agent, she may appoint her husband as such agent.

2. *Who may be the Agent.*

§ 66. Less competence required in agent than in principal.

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[21] See Bodine v. Killeen (1873), 53 N. Y. 93, Wambaugh's Cas. 30, where it is said: "With the removal of common law disabilities from married women, corresponding liabilities have necessarily been imposed upon them. They take the civil rights and privileges conferred subject to all the incidental and correlative burdens and obligations, and their rights and obligations are to be determined by the same rules of law and evidence by which the rights and obligations of the other sex are determined under like circumstances. To the extent, and in the matters of business in which they are by law permitted to engage, they owe the same duty to those with whom they deal, and to the public, and may be bound in the same manner as if they were unmarried. Their common-law incapacity cannot serve as a shield to protect them from the consequences of their acts, when they have the statutory capacity to act. A married woman is *sui juris* to the extent of the enlarged capacity to act conferred by statute, and may be estopped by her acts and declarations, and is subject to all the presumptions which the law indulges against others with full capacity to act for themselves."

[22] See Pringle v. Dunn (1875), 37 Wis. 449, 19 Am. Rep. 772; Knappen v. Freeman (1891), 47 Minn. 491, 50 N. W. 533; Puget Sound Lumber Co. v. Krug (1891), 89 Cal. 237, 26 Pac. 902.

[23] See Ferguson v. Neilson (1890), 17 R. I. 81, 20 Atl. 229, 33 Am. St. R. 855, 9 L. R. A. 155.

[24] § 72.

—Inasmuch as it is the principal who is to be brought into contractual relations with third persons, it is obvious that the question of *his* capacity is much more important than that of the agent. The agent is not the one to be bound; he acts merely in a representative capacity and exercises a derivative authority. A less degree of competency will therefore suffice in the agent than in the principal, and it is often said that any person may be an agent except a lunatic, imbecile or child of tender years. Hence infants, married women, slaves and aliens have been held competent to act as agents.[25]

It is, of course, not meant that an infant, for example, is always an appropriate agent; there are many occasions where much judgment, discretion or special skill may be requisite, which an infant would not ordinarily possess, but that is a consideration which appeals rather to the principal's wisdom in selecting his representative than to any standard of ability which the law may require.

§ 67. **Infant as agent.**—Though an infant may be an agent, the relation is an imperfect one. The infant agent may bind his principal, but neither the principal nor third persons with whom the agent deals can acquire the same rights against the infant agent which they might have if he were an adult.

Thus while the infant agent can doubtless effectually execute the authority conferred upon him, in such sense that neither the principal nor the other party can disregard the contract merely because the agent was an infant, it is also doubtless true that the principal could not enforce any contractual obligation against the infant agent, like an agreement to become agent, or to serve for a definite time;[26] nor could the third person with whom the agent dealt enforce against the agent such a contractual liability, for example, as that which results when an adult agent assumes to make a contract without authority.

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[25] Slave may act as agent: Chastain v. Bowman (1833), 1 Hill (S. Car.) L. 270, Wambaugh's Cas. 3; Governor v. Daily (1848), 14 Ala. 469, Reinhard's Cas. 41; infant may be agent: Talbot v. Bowen (1819), 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747, Reinhard's Cas. 42.

In the case of Cordross's Settlement, (1878) 7 Ch. Div. 728, Sir George Jessel, M. R., said, "I will state that in my opinion it is good law that an infant can exercise a power even though it be coupled with an interest, where an intention appears that it should be exercisable during minority."

§ 68. —— How authorized.—The infant may be the agent of his parent or of strangers, but in either case it must be by virtue of some actual authorization. Even when he is to act for his parent, it must be by virtue of the parent's authority, for, except in some cases respecting necessaries, a child has no implied authority, merely because he is the child, to bind his parent as his agent, as, for example, in buying or selling goods, making contracts or loaning the parent's property.[27] Such an authority may, however, be expressly given or it may be presumed from the parent's conduct, as, for example, by his acquiescence in it when brought to his attention.[28]

§ 69. Infant as servant.—An infant may also be a servant, either of his parent, or of a third person with his parent's consent. Indeed, infants doubtless more frequently act as servants than as agents. While the parent is ordinarily entitled to the services of his infant child, it does not follow that everything which the infant may do will be done as his parent's servant. Whether, on a given occasion, the child was acting as his father's servant with the father's express or implied consent, will usually be a question of fact to be proved. If he was not so acting, the father will not ordinarily be responsible for his act.

Statutes frequently forbid the employment of infants by third persons without the parent's consent, or their employment under certain ages, or in certain occupations at all.

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[26] Infant not liable in damages for his failure to complete contract of service: Widrig v. Taggart (1883), 51 Mich. 103, 16 N. W. 251, Wambaugh's Cas. 7; Derocher v. Continental Mills (1870), 58 Me. 217, 4 Am. Rep. 286; Gaffney v. Hayden (1872), 110 Mass. 137, 14 Am. Rep. 580.

[27] See Johnson v. Stone (1860), 40 N. H. 197, 77 Am. Dec. 706, Mechem's Cas. Ag. 78; Bennett v. Gillett (1859), 3 Minn. 423, 74 Am. Dec. 774, Mechem's Cas. Ag. 79.

[28] See Hall v. Harper (1855), 17 Ill. 82; Swartwout v. Evans (1865), 37 Ill. 442.

Since the introduction of the automobile, there has developed in some states a decided tendency to treat, as in the service of the parent, many uses by the children of the "family automobile" which could scarcely have been so regarded under the ordinary rules.[29]

§ 70. **Married woman as agent.**—A married woman might at common law be the agent of third persons, with her husband's consent, even in their dealings with her husband. It was, however, as in the case of the infant agent, an imperfect relation, because the married woman at common law had no capacity to enter into contractual obligations, and therefore could not bind herself either to her principal or to the third persons with whom she dealt. Under the modern "Married Woman's Acts," her capacity to act as agent is usually made much greater.

§ 71. —— **As agent for her husband.**—Both at the common law and under the modern statutes, the married woman is competent to be the agent of her husband. Her authority as her husband's agent is of two kinds:

1. That sometimes said to be created by law, even against the husband's consent, to buy necessaries on his credit when he has neglected to supply her.[30] This is a matter, however, which does not concern us here, but belongs to the law of husband and wife.

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[29] For a few of the many cases involving the question of the father's liability for the negligence of the child while driving the father's automobile, see Arkin v. Page (1919), 287 Ill. 420, 123 N. E. 30, 5 A. L. R. 216, and *Note;* Doran v. Thomsen (1909), 76 N. J. L. 754, 71 Atl. 296, 131 Am. St. R. 677, 19 L. R. A. (N. S.) 335; Birch v. Abercrombie (1913), 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N. S.) 59; King v. Smythe (1918), 140 Tenn. 217, 204 S. W. 296, L. R. A. 1918F, 293. Many others are cited in a later section. See § 515. See also where wife was driving, Vannett v. Cole (1918), 41 N. Dak. 260, 170 N. W. 663.

[30] See Benjamin v. Dockham (1883), 134 Mass. 418, Mechem's Cas. Ag. 71; McFerren v. Goldsmith-Stern Co. (1921), 137 Md. 573, 113 Atl. 107, 18 A. L. R. 1125.

2. That which arises from his actual authorization, either express or implied, as in the case of his other agents.

The wife has no general authority as her husband's agent merely because she is his wife. Her husband may give her such authority, but it must be conferred either expressly or impliedly, as in the case of his other agents.[31] One of the most familiar instances is that in which the husband places his wife in charge of the domestic establishment, and thereby confers upon her the authority usually incident to such a position; or puts her in charge of his shop or his farm during his absence.[32]

§ 72. Husband as agent for his wife.—Where a married woman is competent to act by agent,[33] her husband may be appointed as the agent. "If she appoints her husband as her agent in such a matter, and in making the appointment acts of her own free will and without coercion from him," said the court in Massachusetts, "we see no reason for regarding her as incapable of authorizing any act to be done by him in her name, and on her behalf, or for shielding her from responsibility. It must be held that whatever is done within the scope of the agency is done by her authority."[34]

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[31] See Benjamin v. Benjamin (1843), 15 Conn. 347, 39 Am. Dec. 384, Mechem's Cas. Ag. 72; Cox v. Hoffman (1838), 4 Dev. & Bat. (N. Car.) 180, Mechem's Cas. Ag. 39; Weisbrod v. Railway Co. (1864). 18 Wis. 35, 86 Am. Dec. 743, Mechem's Cas. Ag. 31, Wambaugh's Cas. 28.

[32] See Meader v. Page (1866), 39 Vt. 306, Wambaugh's Cas. 44; Haberman v. Gasser (1899), 104 Wis. 98, 80 N. W. 105; Wilson v. Herbert (1879), 41 N. J. L. 454, 32 Am. Rep. 243; Bergh v. Warner (1891), 47 Minn. 250, 50 N. W. 77, 28 Am. St. R. 362; Wanamaker v. Weaver (1903), 176 N. Y. 74, 68 N. E. 135, 98 Am. St. R. 621, 65 L. R. A. 529.

Compare Church v. Landers (1833), 10 Wend. (N. Y.) 79; Felker v. Emerson (1844), 16 Vt. 653, 42 Am. Dec. 532.

[33] See *ante* § 63.

[34] See Shane v. Lyons (1898), 172 Mass. 199, 51 N. E. 976, 70 Am. St. Rep. 261. To same effect, Hoene v. Pollak (1897), 118 Ala. 617, 24 So. 349, 72 Am. St. R. 189; Munger v. Baldridge (1889), 41 Kan. 236, 21 Pac. 159, 13 Am. St. R. 273; Third Nat. Bank v. Guenther (1890), 123 N. Y. 568, 25 N. E. 986, 20 Am. St. R. 780; Mayers v. Kaiser (1893), 85 Wis. 382, 55 N. W. 688, 39 Am. St. R. 849, 21 L. R. A. 623.

Her husband, however, has no authority as her agent merely because he is her husband, but his authority must be conferred as in the case of any other agent.[35] And it is said that even clearer evidence of her appointment of him ought to be required when he assumes to act as her agent, than would be required if a stranger were the agent, in order to overcome the equivocal position in which she is placed as his wife.[36]

§ 73. **Corporations as agents.**—A corporation may act as agent either for individuals, partnerships, or other corporations, if the act is within the scope of its corporate powers and not forbidden. Corporations are often organized for this express purpose, as in the case of trust companies, and the like.[37]

§ 74. **Partnerships as agents.**—The same rule applies to partnerships. They may act as agent within the scope of their partnership powers, or may be expressly organized for that purpose. Authority conferred upon a firm is supposed to be conferred upon each member of it, unless the contrary is expressed.

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[35] See Rankin v. West (1872), 25 Mich. 195; Rust-Owen Lumber Co. v. Holt (1900), 60 Neb. 80, 82 N. W. 112, 83 Am. St. R. 512; Carnahan v. Cummings (1920), 105 Neb. 337, 180 N. W. 558, 12 A. L. R. 1455, (with extended Note on Liability of Wife for Husband's Torts); Banks v. Pullen (1917), 113 Miss. 632, 74 So. 424, 4 A. L. R. 1013; Wilson v. Mfg. Co. (1915), 195 Ala. 477, 70 So. 140, 4 A. L. R. 1016; Hines v. Hollingsworth (1917), 178 Ky. 233, 198 S. W. 716, 4 A. L. R. 1018; Milligan v. Alexander (1913), 72 W. Va. 615, 79 S. E. 665, 4 A. L. R. 1022 (with extended Note as to his power to subject wife's property to mechanics' liens).

[36] See McLaren v. Hall (1868), 26 Iowa, 297, Mechem's Cas. Ag. 77; Rowell v. Klein (1873), 44 Ind. 290, 15 Am. Rep. 235; Eystra v. Capelle (1875), 61 Mo. 578; Washington Savings Bank v. Butchers & Drovers Bank (1895), 130 Mo. 155, 31 S. W. 761, by which, it is pointed out in Long v. Martin (1899), 152 Mo. 668, 54 S. W. 473, it was not intended to require the kind of proof demanded in criminal cases, but merely clear and unequivocal proof of the kind required in civil cases.

[37] See Killingsworth v. Trust Co. (1890), 18 Ore. 351, 23 Pac. 66, 17 Am. St. R. 737, 7 L. R. A. 638. Mechem's Cas. 40; McWilliams v. Detroit Mills (1875), 31 Mich. 274.

and therefore the authority may be exercised in behalf of the firm by any one of the partners.[38]

§ 75. Disqualification arising from adverse interest.—Disqualification to act as agent in certain cases may arise from adverse interest. The law does not sanction a person's assuming to act as agent where he already has such an interest in the same matter, either of his own or of another principal, as may prevent his acting fairly toward his principal. Thus the agent of one party cannot lawfully, without the intelligent consent of both principals, undertake to act in the same transaction as the agent of the other party. Neither can a person, without the full and intelligent consent of the other party, lawfully undertake to be both a party to a transaction and the agent of the other party. This subject will be more fully considered hereafter. Violation of this rule will usually render any contract with the guilty agent, and any contract negotiated by him with the other party who colludes with him, voidable at the election of the aggrieved principal.[39]

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[38] See Deakin v. Underwood (1887), 37 Minn. 98, 33 N. W. 318, 5 Am. St. R. 827, Mechem's Cas. 68; Gordon v. Buchanan (1833), 5 Yerg. (13 Tenn.) 71; Frost v. Cattle Co. (1891), 81 Tex. 505, 17 S. W. 52, 26 Am. St. R. 831.

[39] See Rice v. Wood (1873), 113 Mass. 133, 18 Am. Rep. 459, Mechem's Cas. 12; Bell v. McConnell (1881), 37 Ohio St. 396, 41 Am. Rep. 528, Mechem's Cas. 538, Wambaugh's Cas. 913; Davis v. Hamlin (1888), 108 Ill. 39, 48 Am. Rep. 541, Mechem's Cas. Ag. 461, Wambaugh's Cas. 917.

It is not necessary in this class of cases that the interest shall be such as *will* or *must* prevent his acting fairly towards his principal. Here, as before, the law judges of the whole class by the tendency of any particular specimen in that class. It does not make any difference in this particular case whether the agent might have been able to sink entirely his own interest and act with the utmost fidelity. It makes no difference that he is acting and has acted with the utmost fidelity. See Carr v. National Bank & Loan Co. (1901), 167 N. Y. 375, 60 N. E. 649, 82 Am. St. R. 725.

If the principal at the time he employs the agent knows that the latter has an adverse interest of his own, there is no reason so far as he is concerned why he cannot employ him. If he is will-

§ 76. **Disability from lack of professional standing.**—Disability to act as agent may also arise in certain cases from lack of the requisite professional or other similar standing or qualification. Thus it is often true that no one may lawfully represent a litigant in court who is not a regularly admitted attorney of that court.[40] So one who wishes to employ a broker or an auctioneer will often be legally limited in his choice to one who has been duly licensed; and the like.

The consequences of one's attempting to serve who is thus disqualified may be various. A contract negotiated by an unlicensed broker may be declared void by the statute requiring the license, or the broker may be subjected a penalty, or to the forfeiture of his compensation.[41]

3. *Joint Principals.*

§ 77. **Agent may represent several joint principals.**—An agent may be appointed to represent a number of joint prin-

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ing to trust him in view of the facts he may do so. The case spoken of is where the interest is not disclosed. Without that full and intelligent consent on the part of the principal the law absolutely forbids the agent from assuming to act where he has an adverse interest.

See Wildberger v. Hartford Fire Ins. Co. (1894), 72 Miss. 338, 17 So. 282, 48 Am. St. R. 558, 28 L. R. A. 220; Ramspeck v. Pattillo (1898), 104 Ga. 772, 30 S. E. 962, 69 Am. St. R. 197, 42 L. R. A. 197.

If the agent already had another principal, whose interests were adverse, it would usually be a breach of his duty to *that* principal to enter into the service of the other, even though the latter were willing and had knowledge of the facts. Such a situation would ordinarily amount to a collusion by the agent with one of his principals to betray the other.

Under the Statute of Frauds. Under the 17th section of the statute of frauds, the agent to sign the memorandum of the bargain must be some outside party; the other party to the contract may not be the agent: Wright v. Dannah (1809), 2 Camp. 203, Wambaugh's Cas. 10.

[40] See Cobb v. Judge (1880), 43 Mich. 289, 5 N. W. 309, Wambaugh's Cas. 5.

[41] See Holt v. Green (1873), 73 Pa. 198, 13 Am. Rep. 737, Reinhard's Cas. 50.

cipals.[42] The interest which the associates have may be that of partners, or of joint-tenants, or tenants in common of property, or merely that of persons who have united to form a club, society or association in order to accomplish some social, political, religious or other similar purpose. What their interest is, becomes material in determining the extent of their powers and liabilities as joint principals.

§ 78. **Partners, co-tenants, etc., as principals.**—In the case of a partnership, each partner has usually the authority to himself act as an agent, or to appoint an agent whose acts, in reference to the partnership affairs, will bind all of the partners. But in the case of joint tenants, tenants in common, and other similar relations, one party is not, from the mere fact of the relation, impliedly authorized to act for all, and an agent appointed by one will bind that one only and not all, unless all authorized his appointment.[43]

§ 79. **Clubs, societies, etc., as principals.**—Clubs, societies, and unincorporated non-profit making associations are not partnerships, and no authority in one member to bind the others will be implied from the mere fact of membership. A person, therefore, who assumes to act as agent of such a body can bind those only who have, in some way, previously authorized his appointment, expressly or impliedly, or have subsequently ratified it.[44]

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[42] Where a number of co-tenants execute several and separate powers of attorney to the same agent to dispose of the several interest of each, the agent will have no authority to bind them all jointly. Harris v. Johnston (1893), 54 Minn. 177, 55 N. W. 970, 40 Am. St. R. 312.

So where two principals unite in giving a joint power to bind both jointly, it is held that there will be no authority to bind one only: Gilbert v. How (1890), 45 Minn. 121, 47 N. W. 643, 22 Am. St. R. 724, Mechem's Cas. 380.

To same effect: Dodge v. Hopkins (1861), 14 Wis. 630.

But this rule readily gives way before evidence of a contrary intention. Thus where a married man gave a power of attorney authorizing him to act "for me" and to sell, etc. any land "which I now own," etc., and his wife also signed the power of attorney, it was held that this clearly related to land owned by him in which his wife had a right of dower, and not merely to land owned by husband and wife jointly. Roy v. Mining Co. (1910), 113 Minn. 143, 129 N. W. 154.

[43] See Mussey v. Holt (1851), 24 N. H. 248, 55 Am. Dec. 234; Tuttle v. Campbell (1889), 74 Mich. 652, 42 N. W. 384, 16 Am. St. R. 652; Morrison v. Clark (1896), 89 Me. 103, 35 Atl. 1034, 56 Am. St. R. 395.

As in other cases, no particular method of conferring the authority is necessary, unless made so by some express rule of the association. Such an appointment may be authorized by the rules or regulations of the association to which the member assents on joining, or it may be made by and for those who vote for it at a meeting, or it may be ratified by the members who subsequently take the benefit of the acts with knowledge of the facts.[45]

4. *Joint Agents.*

§ 80. Several agents may jointly represent the same principal.—There may also be a number of agents jointly representing the same principal. Where they are appointed by a private principal, the law presumes that the principal relied upon their joint judgment, skill and discretion, and they must therefore all act together in the execution of their authority, and a less number than the whole can not execute it, unless there be some provision in the instrument appointing them or something in the circumstances, such as waiver, acquiescence and the like, which indicates the consent of the principal that less than the whole may act.[46]

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[44] See Ash v. Guie (1881), 97 Pa. 493, 39 Am. Rep. 818, Mechem's Cas. 45; Davison v. Holden (1887), 55 Conn. 103, 10 Atl. 515, 3 Am. St. Rep. 40, Mechem's Cas. 47; Lewis v. Tilton (1884), 64 Iowa, 220, 19 N. W. 911, 52 Am. Rep. 436, Mechem's Cas. Ag. 510; Bennett v. Lathrop (1899), 71 Conn. 613, 42 Atl. 634, 71 Am. St. R. 222.

Of course, to bind any one as principal in these cases, it must appear that dealings upon credit were contemplated, for if it be evident that the authority went no further than to pledge funds provided and supposed to be sufficient, no personal liability would attach. McCabe v. Goodfellow (1892), 133 N. Y. 89, 30 N. E. 728, 17 L. R. A. 204; Riffe v. Proctor (1903), 99 Mo. App. 601, 74 S. W. 409; Hosman v. Kinneally (1903), 43 N. Y. Misc. 76, 45 *id.* 411; Lightbourn v. Walsh (1904), 97 N. Y. App. Div. 187, 89 N. Y. S. 856.

[45] See Fleming v. Hector (1836), 2 M. & W. 172; Todd v. Emly (1841), 7 M. & W. 427; Devoss v. Gray (1871), 22 Ohio St. 159; Ehrmantraut v. Robinson (1893), 52 Minn. 333, 54 N. W. 188, Goddard's Cas. 113.

§ 81. **If the authority is joint and several,** then it is said, all or one only must act and not an intermediate number.[47] If a partnership is the agent, the authority may, as has been seen, be executed by any one of the partners, in the absence of stipulations to the contrary.[48]

The death or disability of one of two or more joint agents will terminate the authority unless it is coupled with an interest in the survivors.[49]

§ 82. **But where the agency is one created by law, and is** public in its nature, the rule is different. In such cases all of the agents or officers must be present to deliberate, or must have notice and an opportunity to be present and deliberate with the others, but a majority of the whole number, if present, may then lawfully meet. A majority of this meeting may then exercise the power.[50]

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[46] See Hawley v. Keeler (1873), 53 N. Y. 114, Mechem's Cas. 50, (continued acquiescence may justify); Loeb v. Drakeford (1883), 75 Ala. 464, Goddard's Cas. 480; Hartford F. Ins. Co. v. Wilcox (1870), 57 Ill. 180; Cedar Rapids, etc. R. Co. v. Stewart (1868), 25 Iowa 115. In Robbins v. Horgan (1906), 192 Mass. 443, 78 N. E. 503, it is said that there are cases in which the consent of all of the agents to the act by one would justify it.

[47] See Guthrie v. Armstrong (1822), 5 B. & Ald. 628, Goddard's Cas. 481, but the rule was said not to be applicable where the power provided for the doing of acts which the agents "or any of them should jointly and separately think proper."

[48] See Deakin v. Underwood (1887), 37 Minn. 98, 33 N. W. 318, 5 Am. St. R. 827, Mechem's Cas. 68.

[49] See *post* § 212.

[50] See First Nat. Bank v. Mt. Tabor (1879), 52 Vt. 87, 36 Am. Rep. 734, Mechem's Cas. 52; McNeil v. Chamber of Commerce (1891), 154 Mass. 277, 28 N. E. 245, 13 L. R. A. 559, Mechem's Cas. 63.

This rule applies to the directors of corporations. Thus after due notice, a majority constitute a quorum, and a majority of that quorum may act.

§ 83. **Liability for each other's acts.**—Where two or more agents have jointly undertaken to act, they are all, like partners, liable to the principal for the proper performance of their joint undertaking.[51] But where they are merely fellow-agents or co-agents,—perhaps appointed at different times and by different acts,—but they did not jointly undertake, one not at fault will not be liable for the nonperformance or the malperformance of the other.[52]

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[51] See Milwaukee Harvester Co. v. Finnegan (1890), 43 Minn. 183, 45 N. W. 9.

[52] See Sergeant v. Emlen (1891), 141 Pa. 580, 21 Atl. 663: Cargill v. Bower (1878), 10 Ch. Div. 502.

CHAPTER V.

OF THE APPOINTMENT OF AGENTS AND THE EVIDENCE THEREOF.

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§ 84. **In general.**—The questions next to be considered will be, I, How the agent may be appointed, and II, By what evidence the fact of his appointment may be established.

I. How the Agent May Be Appointed.

§ 85. **Two parties involved.**—This question obviously involves two aspects: 1. On the part of the principal; and 2. On the part of the agent.

1. *On the Part of the Principal.*

§ 86. **Usually, only by act of principal.**—Except in those cases, if any, in which the law creates the authority, it is the invariable rule, that an agent can only be appointed at the will and by the act of the principal,[1] though that will may find expression in many different ways.

§ 87. **The method to be pursued.**—The law usually prescribes no particular method of conferring the authority. The material question is as to the fact of the appointment rather than as to the method adopted.

There are, however, two classes of cases—one arising under the rules of the common law and one under statutes—in which the authority *must* be conferred in a particular way, and they are: 1. Cases wherein an instrument under seal is to be executed; and, 2, Cases where some statute, usually designed to prevent fraud or perjury, expressly requires the authority to be conferred by writing. These two classes of cases will be considered first, and we will then return to the general rule.

§ 88. 1. **Authority to execute instruments under seal.**—It was the settled rule at common law—and this rule still generally prevails wherever the common law attributes of a seal still persist,—that authority to execute a deed, bond, or other instrument necessarily under seal could be conferred only by a written power under seal.[2]

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[1] See Pole v. Leask (1862), 33 L. J. Rep. Eq. 155, Mechem's Cas. 81.

[2] See Cooper v. Rankin (1813), 5 Bin. (Pa.) 613; Reed v. Van Ostrand (1828), 1 Wend. (N. Y.) 424, 19 Am. Dec. 529; Rowe v. Ware (1860), 30 Ga. 278; Harshaw v. McKesson (1871), 65 N. Car. 688; Watson v. Sherman (1876), 84 Ill. 263; Heath v. Nutter (1862), 50 Me. 378, Mechem's Cas. 91; Long v. Hartwell (1870), 34 N. J. L. 116, Mechem's Cas. 92; Gordon v. Bulkeley (1826), 14 Serg. & R. (Pa.) 331.

§ 89. —— **Filling blanks in such instruments.**—So, since the one who fills blanks in a sealed instrument, which must be filled before the instrument can take effect,—(though signed and sealed by the principal in person)—is the one who really makes the instrument operative, it was equally settled that authority to fill such blanks can usually be conferred only by an instrument under seal.[3] If the filling of the blank was not essential to the validity of the instrument, its filling under a mere parol authority may be ignored.[4]

Much less significance is now attached to seals than formerly, and there is a marked tendency in many States either to abolish the old distinctions by statute,[5] or to disregard them as no longer suited to the times,[6] and a number of cases, accordingly, have held that blanks may be filled under a parol authority.[7]

§ 90. —— **Superfluous seal.**—Even at common law, if the instrument to be executed was unnecessarily under seal, and the authority was sufficient for an unsealed instrument, it is generally held that the superfluous seal will be disregarded and the authority held sufficient,[8] though a few cases deny this rule.[9]

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[3] See Hibblewhite v. McMorine (1840), 6 M. & W. 200, Wambaugh's Cas. 58; Mosby v. State (1857), 36 Tenn. (4 Sneed) 324.

[4] See Vose v. Dolan (1871), 108 Mass. 155, 11 Am. Rep. 331, Wambaugh's Cas. 65, where the instrument was legally effective when executed, and the blanks were filled by inserting the amounts determined from data in the instrument itself. If filling the blanks changed the legal effect, a different question would arise.

[5] See Swartz v. Ballou (1877), 47 Iowa 188, 29 Am. Rep. 470, Goddard's Cas. 68; Streeter v. Janu (1903), 90 Minn. 393, 96 N. W. 1128.

[6] See *e. g.*, Harris v. Shorall (1921), 230 N. Y. 343, 130 N. E. 572.

[7] See Cribben v. Deal (1891), 21 Oreg. 211, 27 Pac. 1046, 28 Am. St. R. 746, Goddard's Cas. 66, Wambaugh's Cas. 74; South Berwick v. Huntress (1865), 53 Me. 89, 87 Am. Dec. 535; Lafferty v. Lafferty (1896), 42 W. Va. 783, 26 S. E. 262; Field v. Stagg (1873), 52 Mo. 534, 14 Am. Rep. 435; Thummel v. Holden (1899), 149 Mo. 677, 51 S. W. 404.

[8] See Long v. Hartwell (1870), 34 N. J. L. 116, Mechem's Ag. Cas. 92; Dickerman v. Ashton (1875), 21 Minn. 538, Wambaugh's Cas. 67; Nichols v. Haines (1900), 98 Fed. 692, 39 C. C. A. 235.

[9] See Rowe v. Ware (1860), 30

So if the instrument is not in fact a deed, the fact that legislation has given it the effect of a deed, does not bring this instrument within the rule requiring authority under seal.[10]

§ 91. —— Estoppel.—In a number of cases, in which a principal has signed and sealed and put into the hands of an agent a deed or bond in blank or with blanks unfilled, and has authorized him by parol to fill up the blanks and to deliver the instrument as an operative one, and the agent has filled up the blanks as authorized and delivered the instrument to one who had no knowledge or notice of the fact that the agent had so filled the blanks, and who relied upon it in good faith, courts, not prepared entirely to disregard the old rule, have held that the principal will be estopped to deny the sufficiency of the agent's authority.[11] And even where the agent fills the blanks, in such a case, otherwise than as authorized, but yet under circumstances which might reasonably have been anticipated by the principal as not unlikely to present themselves, the principal has been held to be estopped as against those who have properly relied upon the apparent validity of the instrument.[12]

Ga. 278; Overman v. Atkinson (1897), 102 Ga. 750, 29 S. E. 758; Baker v. Freeman (1853), 35 Me. 485; Cummins v. Cassily (1844), 44 Ky. (5 B. Mon.) 74.

[10] See *In re* Whitley (1886), 32 Ch. Div. 337, Wambaugh's Cas. 39.

[11] See Phelps v. Sullivan (1885), 140 Mass. 36, 2 N. E. 121, 54 Am. Rep. 442, Mechem's Cas. 101, Wambaugh's Cas. 72.

[12] Thus in White v. Duggan (1885), 140 Mass. 18, 2 N. E. 110, 54 Am. Rep. 437, Wambaugh's Cas. 70, where a surety delivered to the principal debtor a probate bond signed and sealed in blank, with parol authority to fill it in with a certain sum as penalty, and deliver it to the probate judge, and the principal debtor without the surety's knowledge filled it with a larger sum apparently required by the judge, and deposited it in the probate court for the protection of persons dealing with the estate, it was held that it could be enforced for the larger sum. Said the court, *per* Holmes, J., "We are of opinion that, when a bond such as this, is intrusted to the principal for his use, to fill it up and deliver it, the possibility of his being required by the probate judge to insert a penal sum larger than the surety directed, and of his doing so, is so obvious and so near that the surety must be held to take the risk of his principal's

§ 92. —— **Defective deed enforced as contract to convey.**—In other cases, wherein an agent, authorized by parol to sell land, and given a deed with the grantee's name omitted which he was to insert when he found a purchaser, has sold the land as authorized and completed and delivered the deed, it has been held that if the deed is not good as a conveyance, it may still operate as a written contract to sell and convey, which may be specifically enforced by requiring the principal to execute and deliver a proper deed.[13] The same theory has been applied to other cases wherein the agent authorized to sell has executed or delivered a deed without having authority under seal.

§ 93. —— **How when instrument executed in presence of principal.**—Even though the instrument to be executed was necessarily under seal, yet if the instrument was executed in the presence of the principal and by his direction or assent, mere verbal authority was sufficient. This rule still prevails.[14]

The reason given for this rule is that "if the grantor's name

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conduct, and is bound by the instrument as delivered, although delivered in disobedience of orders, if, as here, the obligee has no notice, from the face of the bond or otherwise, of the breach of orders." See also Taylor Co. v. King (1887), 73 Iowa 153, 34 N. W. 774, 5 Am. St. R. 666; Rose v. Douglass Tp. (1893), 52 Kan. 451, 34 Pac. 1046, 39 Am. St. R. 354; McCormick v. Bay City (1871), 23 Mich. 457; State v. Potter (1876), 63 Mo. 212, 21 Am. Rep. 440; Humphreys v. Finch (1887), 97 N. Car. 303, 1 S. E. 870, 2 Am. St. R. 293; Belden v. Hurlbut (1896), 94 Wis. 562, 69 N. W. 357, 37 L. R. A. 853.

[13] See Blacknall v. Parish (1860), 6 Jones (59 N. Car.) Eq. 70, 78 Am. Dec. 239, Wambaugh's Cas. 62. Same principle: Morrow v. Higgins (1856), 29 Ala. 448, Goddard's Cas. 70.

[14] See Gardner v. Gardner (1850), 5 Cush. (Mass.) 483, 52 Am. Dec. 740, Mechem's Cas. 100, Wambaugh's Cas. 61; Bigler v. Baker (1894), 40 Neb. 325, 58 N. W. 1026, 24 L. R. A. 255; Lewis v. Watson (1892), 98 Ala. 479, 13 So. 570, 39 Am. St. R. 82, 22 L. R. A. 297, Goddard's Cas. 71; Pierce v. Dekle (1911), 61 Fla. 390, 54 So. 389, Ann. Cas. 1912D, 1355; Reinhart v. Miller (1857), 22 Ga. 402, 68 Am. Dec. 506; Merchants Bank v. Johnston (1908), 130 Ga. 661, 61 S. E. 543, 14 Ann. Cas. 546; Mariner v. Wiens (1909), 137 Wis. 637, 119 N. W. 340.

is written by the hand of another, in his presence and by his direction, it is his act, and the signature, in point of principle, is as actually his as though he had performed the physical act of making it.''[15]

What will be deemed to be ''in the presence'' of the principal, has not been much considered in the cases.[16] Perhaps the cases arising on the attestation of wills, as to signing ''in the presence'' of the testator, would be deemed significant.

§ 94. —— Authority to deliver deed—Delivery by principal as curing defective signing.—Authority to deliver a deed, executed by the principal in person, may be conferred by parol.[17]

Where the principal in person acknowledges and delivers a deed, executed by an agent without authority under seal, the deed will take effect from and by the delivery.[18]

§ 95. —— How corporation may appoint.—It was also the rule of the common law that a corporation could contract only by deed under its corporate seal, and that its appointment of an agent could be made only in the same manner, but this rule has been quite generally abandoned, and a corporation may now appoint agents in substantially the same manner that an individual may employ them.[19]

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[15] See Mutual Ben. L. Ins. Co. v. Brown (1878), 30 N. J. Eq. 193.

[16] In Reinhart v. Miller, *supra*, the instrument was signed on a gate post 25 or 30 yards from the house in which the principal was, but where the latter could see it done.

[17] See White v. Duggan, *supra*.

[18] See Clough v. Clough (1882), 73 Me. 487, 40 Am. Rep. 386, Wambaugh's Cas. 68; Currier v. Clark (1910), 145 Iowa 613, 124 N. W. 622.

[19] "A great deal of the difficulty," it is said in one case, "originally felt in holding corporations liable for the acts of their agents within the scope of their authority, arose from the supposition that it was necessary that their appointment should be under the seal of their principals. The decisions, both in England and America, have satisfactorily disposed of this technical doubt, and it is now clearly the law, particularly with regard to what are called trading corporations, that no such evidence of authority is required. A private corporation is liable for the acts of its

§ 96. 2. Authority required by statute to be in writing—Land cases.—In very many of the States, by statute (the statute of frauds or its equivalent) an agent to sell and convey, to mortgage or to create trusts in lands or any interest therein, can be authorized only by an instrument *in writing*.[20] In many,

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agents within the scope of their authority, in the same way, and it would appear in the same form, as any individual person is." Pennsylvania Railroad Co. v. Vandiver (1862), 42 Pa. St. 365, 82 Am. Dec. 520.

See also Burrill v. Bank (1840), 2 Metc. (Mass.) 163, 35 Am. Dec. 395; Nobleboro v. Clarke (1878), 68 Me. 87, 28 Am. Rep. 22; Alabama, etc., R. Co. v. South, etc., R. Co., (1887), 84 Ala. 570, 3 So. 286, 5 Am. St. R. 401; Williams v. Fresno Canal Co. (1892), 96 Cal. 14, 30 Pac. 961, 31 Am. St. R. 172; Scofield v. Parlin & Orendorff Co., 61 Fed. 804, 10 C. C. A. 83.

[20] Thus the English Statute of Frauds, (29 Charles II. chap. 3, §§ 1, 3, 4) which furnished the original model for most of the American statutes, provided (Sec. 3): "No leases, estates or interests, either of freehold or terms of years, * * * shall be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized *by writing*, or by act or operation of law." Under sec. 4 of this statute, however, contracts for the sale of lands or any interest therein could be signed by an agent "thereunto lawfully authorized" without adding *by writing*.

The statute in Michigan (Comp. L. 1897, §§ 9509, 9511) following the then New York statute in the first section, but not in the second, declares that "No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized *by writing*." And "Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, be in writing, and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized *by writing*." Statutes more or less similar are found in Alabama, California, Colorado, Illinois, Ohio, and other states.

Not all of the statutes, however, have the same requirements.

also, the same rule applies to the making of leases of land for more than a short period named, usually one year; and, in many, to the making of contracts for the sale of land, as distinguished from a present sale and conveyance.[21]

§ 97. —— **Other cases.**—The policy of the law may extend this requirement of written authority to other cases. Thus, in Kentucky it is enacted that "No person shall be bound as the surety of another by the act of an agent unless the authority of the agent is in writing, signed by the principal."[22]

In California, North and South Dakota, and Montana, authority to execute instruments required to be in writing, can be conferred only by an instrument in writing.[23]

So, as "a contract which by its terms is not to be performed within one year from the making thereof," an executory agree-

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Thus, Wisconsin, for example, while it has a statute identical with the first section quoted above from Michigan, omits the words "by writing" at the close of the second one. The original New York statute made this distinction. Indiana, Iowa, Ohio, Texas and West Virginia do the same. Illinois and Colorado, which at one time did not require written authority for the making of a contract to sell land, later changed the statute and required it; and there are various distinctions in other States which it is not practicable to reproduce here. The statute in each State must be consulted whenever this general question arises. See, for example, Long v. Hartwell (1870), 34 N. J. L. 116, Mechem's Agency Cases, 92; Malone v. McCullough (1890), 15 Colo. 460, 24 Pac. 1040; Kozel v. Dearlove (1892), 144 Ill. 23, 32 N. E. 542, 36 Am. St. Rep. 416; White v. Breen (1894), 106 Ala. 159, 19 So. 59, 32 L. R. A. 127; Alabama, etc., R. Co. v. South, etc., R. Co. (1887), 84 Ala. 570, 3 So. 286, 5 Am. St. Rep. 401.

[21] Under these statutes, an agent may often be authorized to make a *contract* for a sale, which can be specifically enforced by requiring the principal to make the conveyance, even though the agent would not be authorized to make the conveyance.

[22] See Kentucky Statutes, 1899, § 482; Simpson v. Commonwealth (1889), 89 Ky. 412, 12 S. W. 630, 11 Ky. L. Rep. 619.

[23] See Seymour v. Oelrichs (1909), 156 Cal. 782, 106 Pac. 88, 134 Am. St. R. 154; Hartt v. Jahn (1921), 59 Mont. 173, 196 Pac. 153; Lund v. Thackery (1904), 18 S. Dak. 113, 99 N. W. 856; Ballou v. Carter (1912), 30 S. Dak. 11, 137 N. W. 603. See also statutes in Appendix.

ment for a future employment to be entered into more than a year from the making of such agreement, or a present employment for a definite term to extend beyond one year, would not be binding under many of the statutes, following the fourth section of the English Statute of Frauds, unless there was a note or memorandum thereof in writing; though in the second case the employment if entered upon might be good as an employment at will.

§ 98. 3. In other cases, authority may be conferred by parol.—Except in these cases of instruments under seal, and of statutes expressly requiring written authority, it is the general rule that authority for the doing of any act lawful to be done, including the execution of all written instruments other than those mentioned above, may be conferred without writing.[24]

Thus, except in States whose statutes expressly require written authority, an agent may be authorized by parol to sell or lease lands;[25] such an authority suffices, usually, also for the mere purchase of land;[26] and for an agency to demand and collect rents;[27] to subscribe for stocks;[28] to execute written instruments not under seal, such as notes, assignments, bills of sales, chattel mortgages, affidavits, petitions and the like;[29] to fill blanks in such instruments; to buy and sell goods;[30] to "accept and receive" goods under the statute of frauds;[31] to employ and discharge agents and servants; to obtain or surrender insurance; and the like.

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[24] See Worrall v. Munn (1851), 5 N. Y. 229, 55 Am. Dec. 330, Goddard's Cases 59.

There seems to be an impression, easily acquired, but with difficulty removed, that, because authority for the execution of instruments under seal must be conferred by an instrument under seal, authority for the execution of instruments in writing must be conferred by writing. This, however, is not true. Except in the cases already referred to, authority for the execution of written instruments may be conferred without writing. Authority for the execution of negotiable instruments is no exception, though such an authority is not easily implied. (See Jackson v. National Bank (1893), 92 Tenn. 154, 20 S. W. 802, 36 Am. St. R. 81, 18 L. R. A. 663, Mechem's Cas. 415; New York Iron Mine v. National Bank (1878), 39 Mich. 644, Mechem's Cas. 423.)

[25] See *ante* § 96.

[26] That is to say, usually it is enough that there is a memorandum in writing signed by the party *to be charged*, for example, the seller, although it is not signed by the other party, *e. g.* the buyer. See Ullsperger v. Meyer (1905), 217 Ill. 262, 75 N. E. 482, 2 L. R. A. (N. S.), 221, 3 A. & E. Ann. Cas. 1032; Harper v. Goldschmidt (1909), 156 Cal. 245, 104 Pac. 451, 134 Am. St. R. 124, 28 L. R. A. (N. S.) 689; LeVine v. Whitehouse (1910), 37 Utah 260, 109 Pac. 2.

§ 99. —— Need not be express.—The authority, moreover, need not be *expressly* conferred. In the great majority of the cases it is informally conferred, or is inferred from the acts and conduct of the principal.

The important thing is to find the assent of the principal that the agent may act, and the assent of the agent that he will act.

Usually the principal takes the initiative, and requests or directs the agent to act, and the agent assents and accepts the agency. But the situation may be reversed. The agent may take the initiative and tender his services, which offer the principal may assent to and accept.

If the agent should not accept, there would, as to him, be no agency unless he could be estopped to deny his assent, though the principal might in some cases be bound to persons whom he had led to believe that the agent had accepted. So, if the principal should not assent, there would, as to him, be no agency, unless he could be estopped to deny his assent, though the agent might be liable to persons whom he had led to believe that the principal had assented.

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[27] See Sheets v. Selden (1864), 69 U. S. (2 Wall.) 177, 17 L. Ed. 822.

[28] *In re* Whitley Partners (1886), 32 Ch. Div. 337, Wambaugh's Cases 39.

[29] See Dingley v. McDonald (1899), 124 Cal. 90, 56 Pac. 790; Cook v. Buchanan (1890), 86 Ga. 760, 13 S. E. 83; Tibbetts v. Street Ry. Co. (1894), 153 Ill. 147, 38 N. E. 664; Moore v. Taylor (1895), 81 Md. 644, 32 Atl. 320; Moreland v. Houghton (1893), 94 Mich. 548, 54 N. W. 285; Gouldy v. Metcalf (1889), 75 Tex. 455, 12 S. W. 830, 16 Am. St. R. 912.

[30] See Wiger v. Carr (1907), 131 Wis. 584, 111 N. W. 657, 11 L. R. A. (N. S.) 650, 11 A. & E. Ann. Cas. 998.

[31] See Alexander v. Oneida County (1890), 76 Wis. 56, 45 N. W. 21.

§ 100. —— Authority by implication.—Authority may very frequently arise by implication from acts or conduct. One very common case is that wherein the principal, by conferring authority for a given act, is held to have also by implication conferred authority for incidental and appurtenant acts. Where the principal has given authority for a certain act, it must usually be assumed that he meant to make the authority effectual, and, unless the contrary be disclosed, that he meant to have the act done in the usual and ordinary way. Hence arises the familiar rule that every delegation of authority carries with it by implication, unless the contrary is declared, authority to do all of those incidental and subordinate acts which are reasonably necessary and proper to carry into effect the main authority conferred or which are usually and ordinarily done as a part of the main act.[32] General usages may thus affect it, and so may also particular usages if the authority appears to have been conferred with them in view. As an illustration of the main rule, if a chattel be put into the hands of an agent with authority to sell it, he may be found by implication to have authority to deliver the chattel to the purchaser, to receive so much of the purchase price as is to be paid at the time of delivery, and, if there be proof of a usage justifying it, to warrant the quality of the thing sold.[33]

§ 101. —— Another illustration is found in the case in which the principal puts an agent in charge of a business, a factory, a farm, or some other enterprise, place or transaction, to manage, control, conduct or carry it on. Here also there will go with the main authority by implication, unless the contrary is expressed, incidental authority to do all those acts, few or many according to circumstances, which fairly and reasonably belong to the matter so placed under his control and management.[34]

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[32] See Leroy v. Beard (1850), 49 U. S. (8 How.) 451, 12 L. Ed. 1151, Mechem's Cas. 382; Peters v. Farnsworth (1843), 15 Vt. 155, 40 Am. Dec. 671, Mechem's Cas. 387; Hibbard v. Peek (1890), 75 Wis. 619, 44 N. W. 641, Mechem's Cas. 403; Pickert v. Marston (1887), 68 Wis. 465, 32 N. W. 550, 60 Am. Rep. 876, Mechem's Cas. 411.

[33] See *post* § 265.

The manner in which the particular principal carries on his business, though differing from the customary manner, may be taken into account, where the parties have dealt in reliance upon it; and so may an established course of dealing between the particular parties, though differing from that pursued with others.

These may all be cases of an actual authority arising by implication.

§ 102. —— Authority by acquiescence.—Acquiescence in the proposal to act, acquiescence in the doing of the act at the time, even subsequent acquiescence, (*i. e., ratification*[35]) in the act as done, may be sufficient to show the necessary assent or consent to bind the principal. It may be *tacit* or unexpressed in terms. It is often said that "silence gives consent," but this is by no means always true. It is only true when from the failure to speak, under the circumstances, an inference of assent may fairly and reasonably be drawn. This is usually a question of fact.

Consent to or acquiescence in another act may sometimes justify an inference of assent to the act in question. Authority to do one act of a certain kind, or on a certain occasion, furnishes ordinarily very little ground for inferring authority to do a different act or to act on a different occasion;[36] but where the acts increase in number or in frequency until they indicate a course of conduct, or a custom of dealing, or a continuing purpose, their probative force increases until it may reasonably justify an inference of assent to the act in question.[37] So, even in the case of a single previous act, the acquiescence in it or approval of it *may* be so pronounced, so conclusive, so unequivocal, as to justify an inference of authority to do the act now under consideration.[38]

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[34] See Meader v. Page (1866), 39 Vt. 306, Wambaugh's Cas. 44; Lowenstein v. Lombard (1900), 164 N. Y. 324, 58 N. E. 44.

Compare Brockway v. Mullin (1884), 46 N. J. L. 448, 50 Am. Rep. 442, Mechem's Cas. 419; New York Iron Mine v. First Nat. Bank (1878), 39 Mich. 644, Mechem's Cas. 423.

[35] See *post*, Chap. VI. Ratification.

On the effect of acquiescence generally, see Philadelphia, etc. R. Co. v. Cowell (1857), 28 Pa. 329, 70 Am. Dec. 128, Wambaugh's Cas. 1008.

[36] See Graves v. Horton (1887), 38 Minn. 66, 35 N. W. 568, Mechem's Cas. 82; Gregory v. Loose (1898), 19 Wash. 599, 54 Pac. 33, Godd. Cas. 54; Duryea v. Vosburgh (1890), 121 N. Y. 57, 24 N. E. 308; Green v. Hinkley (1879), 52 Iowa 633, 3 N. W. 688; Stevenson v. Hoy (1862), 43 Pa. 191; Union

§ 103. —— Acquiescence ordinarily presupposes knowledge of the act, but there may be cases of acts so notorious, so public, or so closely related to the alleged principal, that he could not be heard to say that he was ignorant of them.[39] So where one regularly and publicly occupies the place and exercises the functions of a certain agency or office, like the cashier of a bank, or regularly and publicly wears the uniform or badge belonging to a certain position while he is acting, like the conductor of a train, a presumption that he was what he appeared to be might arise which would suffice until there was some evidence to the contrary.[40]

Hosiery Co. v. Hodgson (1904), 72 N. H. 427, 57 Atl. 384; Stratton v. Todd (1889), 82 Me. 149, 19 Atl. 111; Hazeltine v. Miller (1857), 44 Me. 177; Hoffmaster v. Black (1908), 78 Ohio St. 1, 84 N. E. 423, 125 Am. St. R. 679, 21 L. R. A. (N. S.) 52, 14 Ann. Cas. 877.

[37] See Valiquette v. Mining Co. (1910), 83 Vt. 538, 77 Atl. 538, 138 Am. St. R. 1104, 31 L. R. A. (N. S.) 440.

[38] Thus in Graves v. Horton, *supra*, it is said that "a single act of an assumed agent, and a single recognition of it, may be of so unequivocal and of so positive and comprehensive a character as to place the authority of the agent to do *similar* acts for the principal beyond question." See also Wilcox v. Chicago, etc., R. Co. (1877), 24 Minn. 269; Quinn v. Dresbach (1888), 75 Cal. 159, 16 Pac. 762; Harrison v. Legore (1899), 109 Iowa 618, 80 N. W. 670; Anderson v. Johnson (1898), 74 Minn. 171, 77 N. W. 26.

[39] See Reynolds v. Collins (1884), 78 Ala. 94.

[40] See Reynolds v. Collins, *supra* (cashier); Singer Mfg. Co. v. Holdfodt (1877), 86 Ill. 455, 29 Am. Rep. 43 (sewing machine agent); Curtis v. Murphy (1885), 63 Wis. 4, 22 N. W. 825, 53 Am. Rep. 242 (clerk in hotel); Markley v. Western Un. Tel. Co.

§ 104. —— Doctrine of estoppel applied.—The doctrine of estoppel is also constantly applied, and even though it may be true that no authority has actually been conferred, the principal will not be permitted to deny it where by his words or conduct he has asserted it, if such denial would prejudice an innocent third person who has reasonably relied upon such words or conduct.[41]

§ 105. —— General rule.—It may therefore be stated as a general rule that whenever the alleged principal has held another person out as his agent authorized to act for him in a given capacity; or has knowingly and without dissent permitted such person to act as though he were his agent in that capacity; or where his habits and course of dealing have been such as to reasonably warrant the presumption that such person was his agent authorized to act in that capacity, whether it be in a single transaction or in a series of transactions—his authority to such person to so act for him in that capacity will be conclusively presumed to have been given, so far as it may be necessary to protect the rights of third persons who have relied thereon in good faith and in the exercise of reasonable prudence; and he will not be permitted to deny that such other person was his agent authorized to do the act he assumed to do, provided

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(1909), 144 Iowa 105, 122 N. W. 136, 138 Am. St. R. 263 (agent of telegraph company); St. Louis, etc., R. Co. v. Dalby (1857), 19 Ill. 353 (conductor of train); Isaacson v. New York Cent. R. Co. (1884), 94 N. Y. 278, 46 Am. Rep. 142 (brakeman checking baggage).

[41] See Pickard v. Sears (1837), 6 Ad. & El. 469; Freeman v. Cooke (1848), 2 Exch. 654; Reynall v. Lewis (1844), 15 Mees. & Wels. 517; Page v. Methfessel (1893), 71 Hun (N. Y.) 442, 25 N. Y. S. 11, 54 N. Y. St. R. 544, Wambaugh's Cas. 47; Columbia Mill Co. v. National Bank (1893), 52 Minn. 224, 53 N. W. 1061, Goddard's Cas. 57; Breckenridge v. Lewis (1892), 84 Me. 349, 24 Atl. 864, 30 Am. St. R. 353, Mechem's Cas. 103; Phelps v. Sullivan (1885), 140 Mass. 36, 2 N. E. 121, 54 Am. Rep. 442, Mechem's Cas. 101.

Estoppel, as here used, has been defined to be: "An impediment or bar by which a man is precluded from alleging or denying a fact, in consequence of his own previous act, allegations or denial to the contrary." Jacob's Law Dict.

that such act was within the real or apparent scope of the presumed authority.[42]

§ 106. —— Limitations.—But authority will not arise from *mere* presumption. It must be based on facts, for which the principal is responsible, and will not arise from any mere argument as to the convenience, utility or propriety of its existence.

The facts, moreover, from which it is implied must be given their ordinary and natural effect, and where the authority is inferred from the adoption of acts of a certain kind, its scope will be limited to the performance of acts of the same kind.[43]

Where agency is sought to be deduced from acquiescence in a single act very much clearer proof of approval is requisite in order to justify an inference of authority to repeat the act, than where there is approval of a series or a class of acts.[44]

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[42] See Johnson v. Hurley (1893), 115 Mo. 513, 22 S. W. 492, Mechem's Cas. 84; Johnston v. Investment Co. (1895), 46 Neb. 480, 64 N. W. 1100; Union Stock Yards Co. v. Mallory (1895), 157 Ill. 554, 41 N. E. 888, 48 Am. St. R. 341; Alabama, etc., R. Co. v. South, etc., R. Co. (1887), 84 Ala. 570, 3 So. 286, 5 Am. St. R. 401; Grant v. Humerick (1904), 123 Iowa 571, 94 N. W. 510; Midland Saving Ass'n v. Sutton (1911), 30 Okla. 448, 120 Pac. 1007.

In Johnston v. Investment Co., *supra*, it was said: "Where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and with the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority." Approved in General Cartage Co. v. Cox (1906), 74 Ohio St. 284, 78 N. E. 371, 113 Am. St. R. 959; Harrison v. Legore (1899), 109 Iowa 618, 80 N. W. 670.

[43] See Bickford v. Menier (1887), 107 N. Y. 490, 14 N. E. 438, Mechem's Cas. 93; Graves v. Horton (1887), 38 Minn. 66, 35 N. W. 568, Mechem's Cas. 82; Gregory v. Loose (1898), 19 Wash. 599, 54 Pac. 33, Goddard's Cas. 54.

[44] Thus in Temple v. Pomroy (1855), 70 Mass. (4 Gray) 128, Wambaugh's Cas. 319, where an agent without authority had given a promissory note in the name of the principal, and the principal when informed of it had protested against it and had only paid the amount upon receiving

2. *On the Part of the Agent.*

§ 107. **Agent must be notified of appointment.**—In order to affect the alleged agent, notice to him of his appointment as as such must ordinarily be given. It is, of course, true that the principal may at times incur obligations to third persons upon the basis that he has appointed or will appoint another as his agent, even though the latter may know nothing about it. Where the question arises between the principal and the agent, and especially if it is contended that a contract of agency exists between them, notice to the agent and an opportunity to accept or reject the appointment, would ordinarily be indispensable. As between third persons and the agent, the same requirement would ordinarily exist, though, as will be seen, a person may incur obligations to third persons by assuming to be the agent of another from whom he may have no color of authority.

§ 108. **Agent must accept appointment.**—Not only must the agent thus have notice of his appointment, but, in order to actually make him an agent, he must ordinarily accept the appointment.[45] He may, however, incur obligations either to the principal or third persons by leading him or them reasonably to rely upon his acceptance, if that reliance would cause proximate loss in case the acceptance were denied.[46] And as between third persons and the principal, the latter might incur obligations based upon his assertion that he had appointed or would appoint a certain person as his agent, which assertion might be relied upon until the third person was informed that the alleged agent did not or would not accept the agency.[47]

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from the agent security for its repayment, it was held that no inference of an authority could be deduced which would justify the making of a second note.

[45] See Barr v. Lapsley (1816), 14 U. S. (1 Wheat.) 151, 4 L. Ed. 58, Wambaugh's Cas. 42; First Nat. Bank v. Free (1885), 67 Iowa 11, 24 N. W. 566; Amber Petroleum Co. v. Breech (1908), 111 S. W. 668; Beebe v. DeBaun (1848), 8 Ark. 510; Pease v. Warren (1874), 29 Mich. 9, 18 Am. Rep. 58; McDonald v. Boeing (1880), 43 Mich. 394, 5 N. W. 439, 38 Am. Rep. 199.

[46] See Siers v. Wiseman (1905), 58 W. Va. 340, 52 S. E. 460; Wright v. Rankin (1871), 18 Grant's Ch. (Ont.) 625.

[47] See Barr v. Lapsley, *supra*.

§ 109. **How acceptance manifested.**—No particular method of accepting the appointment would ordinarily be required; the fact would usually be the important thing. As against the agent himself, the fact that he had actually entered upon the performance of the agency would usually be sufficient.[48] Where a bilateral contract to act was claimed, notice to the principal of the agent's acceptance of his offer would usually be necessary; but where acceptance may be manifested by the doing of the act, performance of the act and notice of that fact within a reasonable time would ordinarily be sufficient.[49]

II. By what Evidence Authority may be Proved.

§ 110. **In general.**—Having now seen how the authority may be created or conferred, the next question is by what evidence that fact may be proved or established in legal actions. The general answer, of course, will be—By proof of the facts by which the authority was so created or conferred, that is, if authority under seal was necessary, by proof of the execution and delivery of the sealed instrument which created it; if authority in writing was necessary, by proof of the writing; if the authority was conferred by formal acts or express words, by proof of those acts or words; if the authority arises or results from conduct or circumstances, then by proof of that conduct or of the circumstances relied upon.

§ 111. **Burden of proof.**—At the outset, it must be kept in mind, since the law itself very rarely creates or presumes authority, not only that agency is usually a fact to be proved, but also that the burden of proving it rests usually upon the party who alleges it,[50] who will ordinarily be the plaintiff or claimant.

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[48] See George v. Sandel (1865), 18 La. Ann. 535.

[49] See Lamb v. Prettyman (1907), 33 Pa. Super. 190; Arnold v. National Bank (1905), 126 Wis. 362, 105 N. W. 828, 3 L. R. A. (N. S.) 580; Bornstein v. Lans (1870), 104 Mass. 214.

[50] See Schmidt v. Shaver (1902), 196 Ill. 108, 63 N. E. 655, 89 Am. St. R. 250, Goddard's Cas. 820; Wisconsin Bank v. Morley (1865), 19 Wis. 62, Goddard's Cas. 823; Parr v. Electrical Co. (1903), 117 Wis. 278, 93 N. W. 1099; Beals v. Merriam (1846),

Where however it is conceded that an authority had existed but it is contended that it had ceased or expired before the act in question; or that a previously unlimited authority had been restricted, and the like, the burden of proving that fact rests also upon the party who alleges it, who will now usually be the defendant.

§ 112. Authority not to be proved by agent's statements or admissions.—The authority of the agent must in all cases be traced to the principal, and must be established by evidence of his acts or statements. One person certainly can not confer authority upon himself, or make himself the agent of another, merely by saying or assuming or representing that he is one, or merely by acting or behaving like one, unless indeed his pretensions or actions have been acquiesced in by that other person.

As against the principal, therefore, the agent's extra judicial admissions or declarations (*i. e.* those made outside of judicial proceedings as distinguished from his *testimony* as a witness in court), are not admissible in evidence for the purpose of establishing, enlarging or renewing the agent's authority;[51] nor

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52 Mass. (11 Metc.) 470; Ward v. Trustees (1905), 27 R. I. 262, 61 Atl. 651; Kelly v. Strong (1887), 68 Wis. 152, 31 N. W. 721.

There must be a preponderance of the evidence in favor of agency. If, therefore, when the evidence is all in, the jury are in real doubt about either the fact of the agency or the authority to do the particular act, the party who relied upon the agency will fail: Beals v. Merriam, *supra.*

So, if the presumptions for and against are equal, the plaintiff will fail: Kelly v. Strong, *supra.*

[51] See Hatch v. Squires (1863), 11 Mich. 185, Mechem's Cas. Ag. 106; Mitchum v. Dunlap (1889), 98 Mo. 418, 11 S. W. 989; Kornemann v. Monaghan (1871), 24 Mich. 36; Graves v. Horton (1887), 38 Minn. 66, 35 N. W. 568, Mechem's Cas. Ag. 82; Kane v. Barstow (1889), 42 Kan. 465, 22 Pac. 588, 16 Am. St. R. 490; Mullanphy Savings Bank v. Schott (1891), 135 Ill. 655, 26 N. E. 640, 25 Am. St. R. 401; Pepper v. Cairns (1890), 133 Pa. 114, 19 Atl. 336, 19 Am. St. R. 625, 7 L. R. A. 750; Baltimore, etc., Relief Ass'n v. Post (1888), 122 Pa. 579, 15 Atl. 885, 9 Am. St. R. 147, 2 L. R. A. 44; Gambill v. Fuqua (1906), 148 Ala. 448, 42 So. 735, Goddard's Cas. 833; Howe Machine Co. v. Clark (1875), 15 Kan. 492, Mechem's Cas. 107, Wambaugh's Cas. 462; Eagle Iron Co.

can his authority be established merely by showing that he acted as agent, assumed to be agent or was generally reputed to be agent.[52] The agent's acts and statements cannot be made use of against the principal until some other evidence of the fact of his agency has first been introduced.[53]

§ 113. —— If, however, the action be against the agent, then his admissions or declarations against his own interest are competent. And, of course, the declarations or admissions of the principal are admissible against himself, though not against the agent.

And so, if the question were, not whether he was in fact an agent, but merely whether at the time he *purported* to act for one principal or another, or for no principal but himself, his statements at the time as to that question would be competent.[54]

If, indeed, the principal should refer third persons to the agent to learn his authority, or if he should authorize the agent to supply the evidence of his own agency, he might then be bound by what the agent said.[55]

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v. Baugh (1906), 147 Ala. 613, 41 So. 663, Goddard's Cas. 840; Wales v. Mower (1908), 44 Colo. 146, 96 Pac. 971, Goddard's Cas. 837; Prouty v. Nichols (1909), 82 Vt. 181, 72 Atl. 988, 137 Am. St. R. 996; Larson v. American Bridge Co. (1905), 40 Wash. 224, 82 Pac. 294, 111 Am. St. R. 904; Black v. Hogsett (1920), 145 Ark. 178, 224 S. W. 439; McCune v. Badger (1905), 126 Wis. 186, 105 N. W. 667.

His written or printed or published statements to prove his agency are as objectionable as his oral ones.

[52] See Davis v. Kneale (1893), 97 Mich. 72, 56 N. W. 220.

[53] When it is said that the agent's statements, admissions and declarations cannot be made use of until the fact of his agency has been shown by other evidence, it is not meant that there must first be a separate verdict found establishing that fact; what is meant is, that regularly there must first be some competent testimony offered tending to prove that fact. It would not ordinarily be a fatal error that this evidence was not offered *first*, if it were later supplied. That would usually be merely a matter of the order of proof, as to which the trial court may exercise a fair discretion.

[54] See Nowell v. Chipman (1897), 170 Mass. 340, 49 N. E. 631.

[55] See Holden v. Phelps (1886), 141 Mass. 456, 5 N. E. 815.

§ 114. —— But agent may be called as a witness.—If the agent's evidence as to his authority is desired, he must be called as a witness; his testimony both as to the fact, and as to the nature and extent of his authority, where it rests in parol, being as competent as that of any other witness.[56]

His testimony, moreover, it is said, "cannot be restricted to the mere words used by the principal, but is admissible generally on the whole subject."[57]

His testimony, however, must be directed to the giving of the facts (from which the jury may decide whether he was agent) and not merely be that he was agent; he is no more competent than any other witness to testify to conclusions.[58]

The agent's testimony, further, like that of any other witness, is not necessarily conclusive. It has such weight as its credibility entitles it to receive. Thus it might be found from other evidence that he was agent, though he testified that he was not, or that he was the agent of one party, although he testified that he was the agent of another.[59]

§ 115. What constitutes the best evidence.—Where the authority relied upon appears to have been conferred by written instrument,[60] and, of course, where under the circumstances it

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[56] As has been pointed out it is necessary to distinguish between what the alleged agent may admit, represent or declare, *out of court*, when he is not under oath or subject to cross-examination, and his *testimony* as to the facts concerning his authority when he is called as a witness. See Howe Machine Co. v. Clark (1875), 15 Kan. 492, Mechem's Cas. 107, Wambaugh's Cas. 462; Thayer v. Meeker (1877), 86 Ill. 470; Wales v. Mower (1908), 44 Colo. 146, 96 Pac. 971, Goddard's Cas. 837.

[57] See Lawall v. Groman (1897), 180 Pa. 532, 37 Atl. 98, 57 Am. St. R. 662. But compare Parker v. Bond (1898), 121 Ala. 529, 25 So. 898. And see Schlitz Brewing Co. v. Grimmon (1905), 28 Nev. 235, 81 Pac. 43.

[58] See McCornick v. Mining Co. (1895), 23 Utah 71, 63 Pac. 820.

[59] See State v. Bristol Savings Bank (1895), 108 Ala. 3, 18 So. 533, 54 Am. St. R. 141.

[60] See Elliott v. Stocks (1880), 67 Ala. 336, Goddard's Cas. 830; Lee v. Insurance Co. (1890), 79 Iowa 379, 44 N. W. 683; Neal v. Patten (1869), 40 Ga. 363; Emery v. King (1900), 64 N. J. L. 529, 45 Atl. 915.

Notice of written authority

must have been in writing—as in the case of the authority under seal or the authority in writing required by the Statute of Frauds[61]—the writing is the best evidence of the existence and nature and extent of the authority, and it must be produced, or its absence accounted for, in any case in which the question of the existence of the authority as so conferred is directly involved. But where the question is only collaterally involved, that is, where it arises incidentally in some other controversy, parol evidence may be admitted, even though the authority was in writing.[62]

And in any case in which the law does not demand that the authority shall be conferred in a particular manner, *e. g.*, by writing or under seal, a third person who is suing the principal and who has evidence of the authority, from the words or conduct of the principal, which would otherwise be adequate to the case, may use that evidence, and is not required to produce or account for a written authority which may be known to exist.[63]

And so, where the law does not demand authority in any particular form, an additional parol authority might be shown to justify certain acts, even though there appeared to be written authority for the doing of other acts.

§ 116. **How question determined.**—Where the authority is in writing and the writing is produced, the question whether an agency has been created by it, and if so, what is its scope and effect, are questions of law for the court.

So if there be no writing but the facts are not disputed, and not more than one inference can reasonably be drawn from them, the question whether under the undisputed facts an agency exists, and if so, what is its nature and extent, is likewise for the court.

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from manner in which agent signed; Mt. Morris Bank v. Gorham (1897), 169 Mass. 519, 48 N. E. 341, Goddard's Cas. 831.

[61] See Somers v. Wescoat (1901), 66 N. J. L. 551, 49 Atl. 462.

[62] See Columbia Bridge Co. v. Geisse (1875), 38 N. J. L. 39

[63] See Walsh v. Pierce (1840), 12 Vt. 130; Kaskaskia Bridge Co. v. Shannon (1844), 6 Ill. 15; Widdifield v. Widdifield (1810), 2 Bin. (Pa.) 245 (partnership case); Curtis v. Ingham (1829), 2 Vt. 287.

But where the authority is not in writing and the facts are in dispute, or if more than one inference may reasonably be drawn from them, it is for the jury to determine, under proper instructions from the court, not only the existence of the agency, but also its nature and effect.[64]

§ 117. **Whose agent is he?**—While ordinarily there is no trouble in deciding whose agent a given person is, where he is certainly the agent of one or the other of the parties to a transaction, there are occasionally cases in which it is exceedingly difficult. A person may begin a transaction as the agent of one party and become later (with the express or implied consent of both), the agent of the other party or of both. Thus an auctioneer may offer goods for sale as the agent of the seller, but when he comes to make a memorandum of the sale he may be the agent of the buyer, or of both. A person is engaged in the negotiation of a loan; the money is received by him and he embezzles it; the loss will ordinarily fall upon him whose agent he was at that time; whose agent was he—the agent of the lender or of the borrower? A broker is negotiating for insurance; is he the agent of the company or of the insured, so as to charge one or the other with responsibility for his knowledge, his negligence, or his default? Ordinarily the question will be one of fact, to be decided in view of the circumstances of the case. Who first set him in motion? Who could control his actions? Who was to pay him? Whose interests was he there to protect? —these and similar questions may throw light upon the case.[65]

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[64] See Loudon Savings Society v. Hagerstown Savings Bank (1860), 36 Penn. 498, 78 Am. Dec. 390, Mechem's Cas. 371; South, etc., Railroad Co. v. Henlein (1875), 52 Ala. 606, 23 Am. R. 578; Willcox v. Hines (1897), 100 Tenn. 524, 45 S. W. 781, 66 Am. St. R. 761; Seehorn v. Hall (1895), 130 Mo. 257, 32 S. W. 643, 51 Am. St. R. 562; Parr v. Electrical Co. (1903), 117 Wis. 278, 93 N. W. 1099.

[65] See Ford v. Postal Tel. Co. (1899), 124 Ala. 400, 27 So. 409; Land Mortgage Co. v. Gillam (1896), 49 S. Car. 345, 26 S. E. 990, 29 S. E. 203; Staats v. Pioneer Ins. Ass'n (1909), 55 Wash. 51, 104 Pac. 185; Fair v. Bowen (1901), 127 Mich. 411, 86 N. W. 991; McMullen v. Savings Ass'n

§ 118. —— Stipulations respecting.—This is a question not necessarily to be conclusively settled by the stipulations of the parties. Thus, though it may be stipulated in an insurance contract or an application for a loan, that a certain person is to be deemed for that transaction the agent of the insured or the borrower, for example, the court may find from other circumstances that he was nevertheless, in fact, the agent of the insurer or the lender.[66]

(1904), 57 Minn. 33, 58 N. W. 820; DeTurck v. Matz (1897), 180 Pa. 347, 36 Atl. 861; Pepper v. Cairns (1890), 133 Pa. 114, 19 Atl. 336, 19 Am. St. R. 625, 7 L. R. A. 750; Moore v. Blackburn (1912), 67 Wash. 117, 120 Pac. 875; Morris McGraw Co. v. German Ins. Co. (1910), 126 La. 32, 52 So. 183, 38 L R. A. (N. S.) 614, 20 Ann. Cas. 1229.

[66] See Union Central L. Ins. Co. v. Pappan (1912), 36 Okla. 344, 128 Pac. 716; McLean v. Ficke (1895), 94 Iowa 283, 62 N. W. 753; Larson v. Investment Co. (1892), 51 Minn. 141, 53 N. W. 179; State v. Savings Bank (1895), 108 Ala. 3, 18 So. 533, 54 Am. St. R. 141; Bates v. American Mtg. Co. (1891), 37 S. Car. 88, 16 S. E. 883, 21 L. R. A. 340.

CHAPTER VI.

OF LIABILITY AND RIGHTS BY RATIFICATION.

§119. How question arises.

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120, 121. Ratification defined.

2. *What Acts may be ratified.*

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123. —— Not void or absolutely illegal acts.
124-126. —— Forgery.

3. *Who may Ratify.*

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128. —— State, corporations, etc.
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131. What conditions must exist.
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133. —— *b.* Principal must be identifiable.
134. —— *c.* Act must have been done as agent.
135. —— *d.* Principal must have been in existence when act was done.
136, 137. —— *e.* Principal must have knowledge of material facts.
138. —— *f.* Must ratify whole act or none.
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140. —— *h.* Ratification may not cut off intervening rights.
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5. *What Amounts to Ratification.*

143. General rule.
144. —— Ratification of instrument under seal.
145. Ratification by authority subsequently conferred.
146, 147. Ratification by conduct — Estoppel.
148-150. —— By accepting benefits.
151. —— By bringing suit.
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6. *The Effect of Ratification.*

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156-158. Effect as between principal and agent.
159. Effect as to rights of other party against principal.
160, 161. Effect as to rights of principal against other party on contracts.
162. —— Effect as to notices, demands, etc.
163. Effect as between agent and other party—In contract.
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§ 119. How question arises.—The matters thus far dealt with have been those which relate to the creation of authority before an act is done. Cases, however, not infrequently arise in which a person has done an act as agent for another which proves to be unauthorized either because an authority actually given was not broad enough to include this act, or because though sufficient authority had once existed it had expired, or because, perhaps, there was no semblance at any time of authority and the act was based upon a mere gratuitous assumption of authority. In all of these cases, of course, the supposed principal is not bound and may repudiate the act when brought to his attention.

Suppose, however, on the other hand, that, when the act is brought to his attention, he approves of it, and would be glad to have it regarded as an act done on his account; or suppose that when the act is brought to his attention, he is so indifferent towards it that he simply does nothing, leaving the matter in such condition that an inference of approval is just as legitimate as the inference of disapproval, or, perhaps, is stronger. What is now the legal situation? May an unauthorized act be subsequently either expressly or impliedly approved; and if so what are the nature and effect of such approval?

To the first question, the answer of the law is certain: There may be a subsequent approval of unauthorized acts. The law terms that subsequent approval *Ratification.*[1] As to the second question, What is the effect of such an approval or ratification, and in what cases will it be operative? it is the purpose of the present chapter to supply the answer.

1. *What is Ratification.*

§ 120. Ratification defined.—Ratification in the law of Agency may be briefly defined as the subsequent adoption and affirmance by one person of an act which another, without authority, has previously assumed to do for him while purporting to act as his agent.[2]

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[1] From *ratus* + *facio:* sometimes called ratihabition, from *ratus* + *habere.*

[2] See McCracken v. San Francisco (1860), 16 Cal. 591, Mechem's Cas. 109; Zottman v. San

Ratification is in many respects a unique and anomalous doctrine. Ordinarily liabilities are incurred at the time an act is done, and rights and obligations under contracts arise at the time the contract is made. Under this doctrine, these matters may be affected by what is done at a later time. It is, in many respects, a doctrine having a fictional character. By something of a fiction, what is later done is deemed to relate back to an earlier time.

§ 121. —— It is an old doctrine. In its earlier form, ratification was said to be comparable to an earlier authority. *Ratihabitio mandato comparatur.* In its later form, it is said to be equivalent to a prior authority, as if by a process of dragging back. *Omnis ratihabitio retrotrahitur et mandato priori aequiparatur.*

Ratification operates as a subsequent act of approval. It is not a contract, and it therefore requires no new consideration.[3] It is not based upon estoppel, and it therefore does not depend upon the fact that someone has changed his position in reliance upon it.[4]

Francisco (1862), 20 Cal. 96, 81 Am. Dec. 96.

Ratification has also another meaning having no necessary connection with Agency at all. See First Nat. Bank v. Drake (1883), 29 Kan. 311, 44 Am. Rep. 646, Goddard's Cas. 73. It is sometimes, but erroneously, said to be distinguishable from another act called *adoption*. See *post* § 135.

[3] If the contract ratified was upon a sufficient consideration, that is enough. See Grant v. Beard (1870), 50 N. H. 129, Wambaugh's Cas. 1021; McLeod v. Morrison (1912), 66 Wash. 683, 120 Pac. 528, 38 L. R. A. (N. S.) 783.

Compare Montgomery v. Crossthwait (1889), 90 Ala. 553, 8 So. 498, 24 Am. St. R. 832, 12 L. R. A. 140; Warren v. Fant (1880), 79 Ky. 1; Wilson v. Hayes (1889), 40 Minn. 531, 42 N. W. 467, 12 Am. St. R. 754, 4 L. R. A. 196.

[4] See Steffens v. Nelson (1905), 94 Minn. 365, 102 N. W. 871, Goddard's Cas. 75; Welch v. Brown (1909), 46 Colo. 129, 103 Pac. 296; Blood v. LaSerena Co. (1896), 113 Cal. 221, 41 Pac. 1017, 45 id. 252; Thompson v. Manufacturing Co. (1906), 60 W. Va. 42, 53 S. E. 908, 6 L. R. A. (N. S.) 311.

Compare St. Louis, etc., Co. v. Wanamaker (1905), 115 Mo. App. 270, 90 S. W. 737; Doughaday v. Crowell (1856), 11 N. J. Eq. 201.

Ratification is wholly optional with the principal in the first instance. No one else can compel him to ratify, though, as will be seen, he may find himself in a situation where he must repudiate or suffer the inference of approval.

2. *What Acts may be Ratified.*

§ 122. **In general, any act which might previously have been authorized.**—As a general rule, a person may ratify the previous unauthorized doing by another in his behalf, of any act which he might then and can still lawfully do himself, and which he might then and can still lawfully delegate to such other to be done.[5]

The act so ratified may be either the making of a contract, or, within the limits referred to in the following section, the commission of a tort.

§ 123. —— **Not void or absolutely illegal acts.**—Ratification can not render valid acts which were *void* when done, or acts which were then so far *illegal in themselves* that they could not then be lawfully authorized;[6] but a person may incur liability by the ratification of an act which another has done in his behalf and as his agent, and which proves to be, or to include, an act of trespass or other tort merely because, while that act might lawfully be done under some circumstances, it was not lawfully done in the case in question.[7]

§ 124. —— **Forgery.**—Whether a forgery can be ratified has been much disputed. Forgery presents ordinarily two aspects: from the public standpoint its character as a crime; and from the private standpoint its character as an unauthorized act. As to the first, it is clear that no ratification by the principal could be pleaded as a bar to the prosecution by the State of the forger for the crime. So any contract that, if the party deceived will not expose or prosecute the forger, the alleged principal will assume and pay the debt, is founded upon an illegal consideration, and the contract cannot be enforced, nor can any ratification in pursuance and as part of that contract be upheld. According to some courts to permit ratification has a tendency to suppress prosecution, even if there is no contract, and hence it cannot be upheld. In some cases, it is said that the act of the forger is void, and therefore can not be ratified.[8]

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[5] See Alexander v. Wade (1904), 106 Mo. App. 141, 80 S. W. 19, Goddard's Cas. 78.

[6] See discussion in Ashbury Railway Carriage Co. v. Riche (1875), L. R. 7 H. L. 653; Brook v. Hook (1871), L. R. 6 Exch. 89, Wambaugh's Cas. 1024; Memphis, etc. R. Co. v. Scruggs (1874), 50 Miss. 284, Goddard's Cas. 79.

[7] See Lewis v. Read (1845), 13 Mees. & Wels. 834, Wambaugh's Cas. 1001; Dempsey v. Chambers (1891), 154 Mass. 330, 28 N. E. 279, 26 Am. St. R. 249, 13 L. R. A. 219, Goddard's Cas. 197, Wambaugh's Cas. 1030.

§ 125. —— Considered not as a crime, but merely as an unauthorized act, it is held in some cases that there can be no ratification because the actor (the forger) did not at the time purport to act as agent,[9] and this fact is usually held essential.[10] Some courts deny that this is essential to ratification, and others are disposed to hold that, if essential, it is sufficiently satisfied, in such a case, to enforce a liability in a civil action.[11]

§ 126. —— Entirely independent of ratification, it is held in many cases that where the present holder of the obligation has been led to acquire it, or otherwise change his situation detrimentally, in reliance upon the alleged principal's assurance of the genuineness of the writing, the latter will later be estopped to assert the contrary.[12]

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[8] See Henry v. Heeb (1887), 114 Ind. 275, 16 N. E. 606, 5 Am. St. R. 613, Mechem's Cas. 115; Shisler v. Vandike (1880), 92 Pa. 447, 37 Am. Rep. 702.

[9] See Henry v. Heeb, *supra;* Brook v. Hook (1871), L. R. 6 Exch. 89, Wambaugh's Cas. 1024; Christian Building & L. Ass'n v. Walton (1897), 181 Pa. 201, 37 Atl. 261, 59 Am. St. R. 636, Goddard's Cas. 81; Howell v. McCrie (1887), 36 Kan. 636, 14 Pac. 257, 59 Am. Rep. 584; Shinew v. Bank (1911), 84 Ohio St. 297, 95 N. E. 881, 36 L. R. A. (N. S.) 1006.

In Brook v. Hook and Shinew v. Bank, *supra*, reliance is placed upon the proposition that a *void* act cannot be ratified.

[10] See *post* § 134.

[11] See Greenfield Bank v. Crafts (1862), 86 Mass. (4 Allen) 447, Mechem's Cas. 110; Central Nat. Bank v. Copp (1903), 184 Mass. 328, 68 N. E. 334; Hefner v. Vandolah (1872), 62 Ill. 483, 14 Am. Rep. 106; Campbell v. Campbell (1901), 133 Cal. 33, 65 Pac. 134.

See also Fay v. Slaughter (1902), 194 Ill. 157, 62 N. E. 530, 88 Am. St. R. 148, 56 L. R. A. 564.

3. *Who may Ratify.*

§ 127. In general, any person who might have authorized.—As a general rule any person who was competent to do an act when it was done and who is still competent to do it, may ratify its unauthorized doing by another as his agent.

§ 128. —— State, corporation, etc.—Thus the State, municipal and private corporations, partnerships, and partners, may ratify an act which it or they could then and can still authorize.[13] And of course, *e converso*, neither can do by ratification what it, he or they would be powerless to authorize directly.

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[12] The typical cases are the ones in which, the present holder, *before* he acquired the instrument in question, *e g.*, a promissory note, inquired of the alleged maker if it was genuine, and being assured that it was, took it; or in which, while he may have taken the note without inquiry, he is induced by assurances of its genuineness, to give up or forbear from measures which he would otherwise have taken to protect himself. See Workman v. Wright (1878), 33 Ohio St. 405, 31 Am. Rep. 546 (no estoppel found); Casco Bank v. Keene (1865), 53 Me. 103; Rudd v. Mathews (1881), 79 Ky. 479, 3 Ky. Law R. 893, 42 Am. Rep. 231; Hefner v. Dawson (1872), 63 Ill. 403, 14 Am. Rep. 123; Lynch v. Richter (1895), 10 Wash. 486, 39 Pac. 125.

As to fraudulent alteration, see Wilson v. Hayes (1889), 40 Minn. 531, 42 N. W. 467, 4 L. R. A. 196, 12 Am. St. R. 754, Goddard's Cas. 82; Montgomery v. Crossthwait (1889), 90 Ala. 553, 8 So. 498, 24 Am. St. R. 832, 12 L. R. A. 140.

[13] See State v. Torinus (1879), 26 Minn. 1, 49 N. W. 259, 37 Am. Rep. 395; State v. Buttles' Ex'r. (1854), 3 Ohio St. 309; Forbes v. Hagman (1881), 75 Va. 168, Mechem's Cas. 122; School District v. Insurance Co. (1873), 62 Me. 330, Mechem's Cas. 194; Melledge v. Iron Co. (1849), 5 Cush. (Mass.) 158, 51 Am. Dec. 59; North Point, etc., Co. v. Utah Canal Co. (1898), 16 Utah 246, 52 Pac. 168, 67 Am. St. R. 607, 40 L. R. A. 851; Union School Furniture Co. v. School District (1893), 50 Kans. 727, 32 Pac. 368, 20 L. R. A. 136; Commercial Electric L. & P. Co. v. Tacoma (1898), 20 Wash. 288, 55 Pac. 219, 72 Am. St. R. 103; First Nat. Bank v. Gay (1876), 63 Mo. 33, 21 Am. Rep. 430, Goddard's Cas. 95; Kelsey v. Nat. Bank

In the case of municipal corporations, the power to ratify is often necessarily very much restricted by requirements that they shall contract in a specified manner, which it may be difficult to satisfy at a later time.

§ 129. —— **Infants—Married women.**—It has been often said that an infant can not ratify, and this would be true under the older rule treating an infant's appointment of an agent as *void.*[14] Under what is thought to be the better and more modern rule, he might ratify in those cases in which he might have authorized and with the same effect.

Since at common law a married woman could not act by agent, she could not bind herself by ratification; but, as has been seen, the common law condition has been greatly altered, and married women, under the modern statutes, may ratify such acts and, of course, such only as they are competent to authorize.[15]

§ 130. —— **Agent.**—An agent cannot ratify his own act,[16]

(1871), 69 Pa. 426, Goddard's Cas. 98; Moody, etc. Co. v. Trustees (1896), 99 Wis. 49, 74 N. W. 572; Frank v. Board of Education (1917), 90 N. J. L. 273, 100 Atl. 211, L. R. A. 1917D, 206.

[14] It must be kept in mind that what is here referred to is ratification of an act of an assumed agent, and not that other kind of act, also often called "ratification," namely, affirmation by a person after he becomes of age of what he himself did while under age. If his appointment of an agent were *void*, as it was formerly said to be, he could not ratify, either before or after maturity, the act of an assumed agent done while he was an infant.

[15] See Hoene v. Pollak (1897), 118 Ala. 617, 24 So. 349, 72 Am. St. R. 189; Pattison v. Babcock (1891), 130 Ind. 474, 30 N. E. 217; Kirkpatrick v. Pease (1906), 202 Mo. 471, 101 S. W. 651.

Compare McFarland v. Heim (1894), 127 Mo. 327, 29 S. W. 1030, 48 Am. St. R. 629.

[16] See Britt v. Gordon (1906), 132 Iowa 431, 108 N. W. 319; McAdow v. Railway Co. (1917), 100 Kan. 309, 164 Pac. 177, L. R. A. 1917E, 539.

Nor the act of his own servant: Trudo v. Anderson (1862) 10 Mich. 357, 81 Am. Dec. 795, Goddard's Cas. 100. See also Bullard v. DeGroff (1900), 59 Neb. 783, 82 N. W. 4; Lyndon Mill Co. v. Lyndon L. & B. Inst. (1891), 63 Vt. 581, 22 Atl. 575, 25 Am. St. R. 783.

nor can one of two joint and equal agents ratify the act of his fellow agent;[17] but one agent may ratify the act of another agent of the same principal, where the agent who ratifies has himself general authority over the act ratified.[18] This doctrine is most frequently applied to the ratification by superior agents of the acts of subordinate agents of corporations.

4. *Conditions of Ratification.*

§ 131. What conditions must exist.—In order to effect a ratification, the following conditions must ordinarily exist:

§ 132. ——— a. Present ability.—The person ratifying must have the present ability to do the act himself or to authorize it to be done.[19] Hence if, before ratification, the principal has become incompetent to do or authorize the act, he cannot ratify, or if the intervening rights of third persons render the act now incompetent, there can be no ratification which would defeat those rights.

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[17] See Penn v. Evans (1876), 28 La. Ann. 576.

[18] See U. S. Express Co. v. Rawson (1885), 106 Ind. 215, 6 N. E. 337; Platt v. Francis (1912) 247 Mo. 296, 152 S. W. 332; Toledo, etc., R. Co. v. Prince (1869), 50 Ill. 26; Pacific R. Co. v. Thomas (1877), 19 Kan. 256; Walworth County Bank v. Farmers' L. & T. Co. (1863), 16 Wis. 629; First Nat. Bank v. Kimberlands (1880), 16 W. Va. 555; Palmer v. Cheney (1872), 35 Iowa 281; Mound City Mut. L. Ins. Co. v. Huth (1873), 49 Ala. 529.

In Ironwood Store Co. v. Harrison (1889), 75 Mich. 197, 42 N. W. 808, Mechem's Cas. 124, it is said, "Ratification by an agent depends upon certain facts which must affirmatively be made to appear:—

1. The agent ratifying must have had general power to do himself the act which he ratifies.

2. They must both be agents of the same principal, and the agent whose act is in question must have professed to act as agent of the common principal."

The same rule is expressed in a different way when it is said "An agent can in some cases ratify an act done by a sub-agent by adopting it as his own, but such ratification will not bind the principal unless it is an act which was within the agent's authority to do." Wright on Principal and Agent (2d ed.), 54.

[19] See McCracken v. San Francisco (1860), 16 Cal. 591, Mechem's Cas. 109, *per* Field, J., repeated by him in Marsh v. Fulton Co. (1870), 10 Wall. (77 U. S.) 676, 19 L. Ed. 1040.

§ 133. —— b. Principal must be identifiable.—The person for whom the act was done must then have been either identified or capable of being identified. In other words, the person who did the act must have acted for the particular person ratifying or, if he did not know who the particular person was, then for a person described in such terms,—*e. g.*, "the owner," "the legal heir," "the executor," etc.,—as will enable him to be identified.[20]

The alleged agent may not simply go out and act for somebody, and then later determine who he shall be.

§ 134. —— c. Act must have been done as agent.—The act must have been done, by the person acting, *as* agent and not on his own account or as agent for some other person than the principal now in question.[21] That is, the person who did the act must at the time not only have *intended* to act on behalf of the person ratifying, but it seems also to be necessary that he should then have *professed* to act for a principal, though it is not necessary that he should have disclosed who the principal was if he be capable of identification within the rule already stated.[22] The contrary rule, however, is laid down in a few

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[20] See Foster v. Bates (1843), 12 Mees. & Wels. 226, Mechem's Cas. 127, Wambaugh's Cas. 1000; Watson v. Swann (1862), 11 C. B. (N. S.) 756, Goddard's Cas. 93; Lyell v. Kennedy (1889), 14 App. Cas. 437.

[21] See Wilson v. Tumman (1843), 6 Man. & G. 236, s. c. 1 Dowl. & Lown. 513, s. c. 6 Scott, N. R. 894, Goddard's Cas. 85, Wambaugh's Cas. 997; Hamlin v. Sears (1880), 82 N. Y. 327, Mechem's Cas. 136; Wyckoff v. Davis (1905) 127 Iowa 399, 103 N. W. 349, Goddard's Cas. 86.

"A man can ratify that which purports to be done for him, but he cannot ratify a thing which purports to be done for somebody else." *Per* Bowen, L. J., in Falcke v. Insurance Co. (1886), 34 Ch. Div. 234, 250.

[22] See Keighley v. Durant [1901], App. Cas. 240, overruling Durant v. Roberts [1900], 1 Q. B. 629; Mitchell v. Minnesota Fire Ass'n (1892), 48 Minn. 278, 51 N. W. 608; Ferris v. Snow (1902), 130 Mich. 254, 90 N. W.

States.[23]

It is enough, under the general rule, that the professed principal was known at the time, though he was not named as such in the contract.[24]

§ 135. —— d. Principal must have been in existence when act was done.

—The person ratifying must have been in existence at the time the act was done, and must then have been competent to do or authorize that act.[25] This requirement results from the retroactive nature of ratification.

This question arises more frequently in the case of contracts made or acts done by the "promoters" or other persons acting in behalf of a proposed corporation than in any other class of cases. The question is, may the corporation when organized ratify these acts done or contracts made before it had any existence? There is real difficulty in saying that there may be *ratification* by a body which had no existence and therefore no

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850, wherein it is held that it is necessary that he should have professed to act as agent. It seems, moreover, to be sufficient that he professed to act as agent, though he had a fraudulent purpose to really take the benefit on his own account. *In re* Tiedeman [1899], 2 Q. B. Div. 66.

See also Schlessinger v. Forest Products Co. (1909), 78 N. J. L. 637, 76 Atl. 1024, 138 Am. St. R. 627, 30 L. R. A. (N. S.) 347; Fraser v. Sweet (1900), 13 Manitoba L. R. 147, 2 Br. Rul. Cas. 254; Security Loan & Tr. Co. v. Powell (1916), 119 Va. 231, 89 S. E. 91.

One who acts as a public officer, *e. g.*, a sheriff or constable in serving a writ, does not usually act as *agent* of the party who sued out the writ. See Wilson v. Tumman, *supra;* Hyde v. Cooper (1854), 26 Vt. 552.

[23] Thus in Hayward v. Langmaid (1902), 181 Mass. 426, 63 N. E. 912, it is held not to be necessary that he should have been understood to be an agent by the person with whom he dealt.

See also Greenfield Bank v. Crafts (1862), 4 Allen (Mass.) 447, Mechem's Cas. 110; Barnett v. Lynn (1922), 118 Wash. 315, 203 Pac. 389.

On "Ratification by an Undisclosed Principal," see Professor E. C. Goddard in 2 Michigan Law Review, 25.

[24] See Lagumis v. Gerard (1921), 116 N. Y. Misc. 471, 190 N. Y. Supp. 207.

[25] See Kelner v. Baxter (1866), L. R. 2 C. P. 174, Wambaugh's Cas. 1016; *In re* Empress Engineering Co. (1880), 16 Ch. Div. 125, Goddard's Cas. 90; Pennell v. Lothrop (1906), 191 Mass. 357, 77 N. E. 842.

power to do or authorize the act when done. Some courts. realizing the difficulty, have held that there may be *adoption* but not *ratification.*[26] One difference in result is that in the case of adoption the contract is not deemed to be made until the date of the adoption, while in case of ratification the contract is deemed to be made from the beginning.[27] Some courts seem to regard it merely as a difference in names.[28] Some courts speak of it as ratification.[29]

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[26] See McArthur v. Times Printing Co. (1892), 48 Minn. 319, 51 N. W. 216, 31 Am. St. R. 653, Mechem's Cas. 128; Battelle v. Northwestern Cement Co. (1887), 37 Minn. 89, 33 N. W. 327, Goddard's Cas. 92; Robbins v. Bangor Co. (1905), 100 Me. 496, 62 Atl. 136, 1 L. R. A. (N. S.) 963; Pittsburgh Mine Co. v. Quintrell (1892), 91 Tenn. 693, 20 S. W. 248; Smith v. Parker (1897), 148 Ind. 127, 45 N. E. 770.

[27] See McArthur v. Times Printing Co., *supra.*

[28] See Oakes v. Water Co. (1894), 143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544; Schreyer v. Flour Co. (1896), 29 Oreg. 1, 43 Pac. 719, Goddard's Cas. 74.

[29] See Stanton v. New York, etc., R. Co. (1890), 59 Conn. 272, 22 Atl. 300, 21 Am. St. R. 110.

That corporation can neither *ratify* nor *adopt*, but can make a new contract in the same terms as those proposed by the promoters, see Pennell v. Lothrop, *supra;* Koppel v. Brick Co. (1906), 192 Mass. 223, 78 N. E. 128.

Some of the cases can be sustained on the ground that the offer made to the promoters was a continuing one, which the corporation could accept when it came into existence and thus make a contract at that time.

Where there was a present contract between the promoters and the other party, there may often be an express or implied *novation*, by which the promoter is released and the corporation is sustituted in his place. Such a substitution may be provided for in the original contract. See Heckman's Estate (1896), 172 Pa. 185, 33 Atl. 552; Chicago Bl'd'g Co. v. Creamery Co. (1898), 106 Ga. 84, 31 S. E. 809; Shields v. Clifton Land Co. (1894), 94 Tenn. 123, 28 S. W. 668, 45 Am. St. R. 700, 26 L. R. A. 509.

In Whitney v. Wyman (1879), 101 U. S. 392, 25 L. Ed. 1050, an offer made by promoters for the corporation was accepted by a letter addressed to the corporation, after the articles of incorporation were executed but before they were filed. The promoters were held not personally liable. In Paxton Cattle Co. v. First Nat. Bank (1887), 21 Neb. 621, 33 N. W. 271, 59 Am. Rep. 852, where the facts were much the same concerning organization the corporation was held liable.

Many cases hold that if the corporation after organization, takes

On the other hand, it has been asserted by a distinguished English judge that there is no such thing in law as adoption, in the sense here used, as distinguished from ratification.[30]

In the case of an administrator, it is held that the act of one purporting to act as agent for the person entitled, may be ratified by the administrator, though subsequently appointed, since the appointment is, in law, deemed to relate back to the time of the death of the intestate.[31]

§ 136. —— e. Principal must have knowledge of material facts.—The person alleged to have ratified must, at the time of the alleged ratification, have either had full knowledge of all of the material facts relating to the act ratified or he must have deliberately assumed responsibility for the act, having all the knowledge of the facts which he cared to have.[32] Knowledge of

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the benefit of contracts made on its account before organization, it must take them with the obligations in reliance upon which the benefits were furnished. See Paxton Cattle Co. v. First Nat. Bank, *supra;* Bell's Gap R. Co. v. Christy (1875), 79 La. 54, 21 Am. Rep. 39, Mechem's Cas. 131; Buffington v. Bardon (1891), 80 Wis. 635, 50 N. W. 776.

[30] In Falcke v. Insurance Co. (1887), L. R. 34 Ch. Div. 234, 249, Bowen, L. J. said: "There is nothing more vague than the way in which the word 'adoption' is used in arguments at law and sometimes ambiguous language used about adoption is imported into arguments about ratification. There is no such thing in law as adopting or ratifying anything except where there is the sanctioning of an act professedly done on your behalf in such a sense as to make you liable for it. A man can ratify that which purports to be done for him, but he cannot ratify a thing which purports to be done for somebody else. Ratification only takes effect in law from its being equivalent to a previous authority, and a previous authority is an incident which only arises in the relation of principal and agent. There have been many attempts to make people liable by what is called adoption of a contract or some other act which never purported to be made or done on their behalf and such attempts have failed. I may instance as a leading type of that class of cases the attempts that have been made of late to make companies liable for contracts entered into by promoters."

[31] See Foster v. Bates (1843), 12 Mees. & Wels. 226, Mechem's Cas. 127, Wambaugh's Cas. 1000.

[32] See Combs v. Scott (1866), 12 Allen (Mass.) 493, Mechem's

the material facts is essential, but knowledge of the legal effect of those facts is not essential.[33]

Ratification being essentially a matter of approval and election, it is ordinarily indispensable in an action *against* the principal to show that he had knowledge of that which he is alleged to have approved. Where, however, he himself takes the initiative and relies upon his own ratification to make a claim against the other party, it may more readily be assumed that he had knowledge, and certainly where he persists in his claim, after knowledge comes to him, he cannot ordinarily escape the consequences of ratification.

§ 137. —— What facts are *material*, within this rule, can scarcely be made clearer than the word itself indicates, unless perhaps by saying that they are those facts which seem to be essential to an intelligent and balanced consideration of the matter.

The knowledge requisite here is ordinarily actual knowledge either of the principal himself, or of the superior agent, if any, who ratifies. The knowledge of the agent, who did the act, of his own unauthorized conduct, will not by imputation be deemed

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Cas. 146; Smith v. Tracy (1867), 36 N. Y. 79, Mechem's Cas. 154; Wheeler v. Northwestern Sleigh Co. (1889), 39 Fed. 347, Mechem's Cas. 138; Lewis v. Read (1845), 13 Mees. & Wels. 834, Wambaugh's Cas. 1001, Goddard's Cas. 114; Valley Bank v. Brown (1905), 9 Ariz. 311, 83 Pac. 362, Goddard's Cas. 101; Moyle v. Congregational Society (1897), 16 Utah 69, 50 Pac. 806, Goddard's Cas. 104; Thompson v. Mercantile Co. (1906), 60 W. Va. 42, 53 S. E. 908, 6 L. R. A. (N. S.) 311, Goddard's Cas. 105; Wheeler v. McGuire (1888), 86 Ala. 398, 5 So. 190, 2 L. R. A. 808; Brown v. Wright (1893), 58 Ark. 20, 22 S. W. 1022, 21 L. R. A. 467; Cram v. Sickel (1897), 51 Neb. 828, 71 N. W. 724, 66 Am. St. R. 478; Bierman v. City Mills (1897), 151 N. Y. 482, 45 N. E. 856, 56 Am. St. R. 635, 37 L. R. A. 799.

This requirement applies in tort cases: Steinman v. Laundry Co. (1908), 109 Md. 62, 51 Atl. 517, 21 L. R. A. (N. S.), 884; Tucker v. Jerris (1883), 75 Me. 184; Myers v. Shipley (1922), 140 Md. 380, 116 Atl. 645, 20 A. L. R. 1460; Corrigan v. Bobbs-Merrill Co. (1920), 228 N. Y. 58, 126 N. E. 260, 10 A. L. R. 662.

[33] See Kelley v. Newburyport, etc., R. Co. (1886), 141 Mass. 496, 6 N. E. 745, Goddard's Cas. 110.

to be the knowledge of the principal.[34] Means of knowledge merely, is not here usually equivalent to knowledge.

The principal is ordinarily not obliged to suspect or search for excesses, and a principal who takes the benefit of what appears to be an authorized act will not thereby be deemed to have ratified unauthorized parts of it of which he was ignorant.[35] But where the whole transaction appears to have been unauthorized, it is then said to be his duty to inquire before he accepts the benefits.[36]

§ 138. —— f. Must ratify whole act or none of it.—The principal cannot ratify the act so far as it is favorable to him, and reject it as to the residue; but he must ratify all or none. If with knowledge of the facts, he takes the benefits of an act done on his account, he must also, ordinarily, assume the burdens.[37] But where the principal has authorized the doing of a certain act, he does not, by accepting the benefits of that act, assume responsibility for an additional unauthorized act of whose performance he was ignorant.[38]

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[34] See Adams Express Co. v. Trego (1871), 35 Md. 47; Thompson v. Railway Co. (1910), 80 N. J. L. 328, 78 Atl. 152; Los Angeles Inv. Co. v. Bank (1919), 180 Cal. 601, 182 Pac. 293, 5 A. L. R. 1193.

[35] See Tucker v. Jerris (1883), 75 Me. 184.

[36] See Ehrmantraut v. Robinson (1893), 52 Minn. 333, 54 N. W. 188; Hyde v. Cooper (1854), 26 Vt. 552.

[37] See Eberts v. Selover (1880), 44 Mich. 519, 7 N. W. 225, 38 Am. Rep. 278, Mechem's Cas. 150; Wheeler v. N. W. Sleigh Co. (1889), 39 Fed. 347, Mechem's Cas. 138; Baldwin v. Burrows (1872), 47 N. Y. 199, Mechem's Cas. 196; Smith v. Tracy (1867), 36 N. Y. 79, Mechem's Cas. 154; Roberts v. Rumley (1882), 58 Iowa 301, 12 N. W. 323, Mechem's Cas. 143; Wheeler & Wilson Co. v. Aughey (1891), 144 Pa. 398, 22 Atl. 667, 27 Am. St. R. 638, Mechem's Cas. 152; Rudasill v. Falls (1885), 92 N. Car. 222, Goddard's Cas. 118; Mundorff v. Wickersham (1869), 63 Pa. 87, 3 Am. Rep. 531, Goddard's Cas. 120; National Improvement Co. v. Maiken (1897), 103 Iowa 118, 72 N. W. 431, Goddard's Cas. 121; Eastman v. Relief Ass'n (1889), 65 N. H. 176, 18 Atl. 745, 23 Am. St. R. 29, 5 L. R. A. 712; Daniels v. Brodie (1891), 54 Ark. 216, 15 S. W. 467, 11 L. R. A. 81; Busch v. Wilcox (1890), 82 Mich. 337, 47 N. W. 328, 21 Am. St. R. 563; Dolvin v. American Harrow Co. (1906), 125 Ga. 699, 54 S. E. 706, 28 L. R. A. (N. S.), 785; Nye v. Swan (1892), 49 Minn. 431, 52 N. W. 39.

The rule, moreover, would not apply to wholly severable and disconnected transactions.

§ 139. —— g. **Transaction must still stand.**—The transaction must still stand; there must be something to ratify. Hence, if, before the alleged ratification, the transaction has expired, if the conditions make it no longer possible, if it has been cancelled, it cannot ordinarily be ratified.[39]

§ 140. —— h. **Ratification may not cut off intervening rights.**—The ratification can not be made to operate so as to cut off the intervening rights of third persons who have acted in good faith, *e. g.*, intermediate lessees, purchasers, or attaching creditors.[40]

§ 141. —— i. **Burden of proof.**—The party alleging that ratification has taken place must establish it by a preponderance of the evidence.[41]

§ 142. —— **Consideration—Intention.**—No new consideration is necessary. The original consideration suffices.[42]

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[38] See Wheeler v. Sleigh Co., *supra;* Smith v. Tracy, *supra;* Roberts v. Rumley, *supra.*

[39] See Walter v. James (1871), L. R. 6 Exch. 124, Wambaugh's Cas. 1049, where, before an unauthorized payment had been ratified, the agent and the other party had agreed to rescind it and the money had been returned; Stillwell v. Staples (1859), 19 N. Y. 401, where a volunteer who had obtained insurance on another's goods, before ratification surrendered the policy and it was cancelled.

[40] See Cook v. Tullis (1873), 18 Wall. (U. S.) 332, 21 L. Ed. 933, Mechem's Cases. 160; Graham v. Williams (1901), 114 Ga. 716, 40 S. E. 790, Goddard's Cas. 180; Norton v. Ala. Nat. Bank (1893), 102 Ala. 420, 14 So. 892; Clendenning v. Hawk (1901), 10 N. Dak. 90, 86 N. W. 114; Pollock v. Cohen (1877), 32 Ohio St. 514; Borderre v. Den (1895), 106 Cal. 594, 39 Pac. 946.

[41] See Reese v. Medlock (1863), 27 Tex. 120, 84 Am. Dec. 611; U. S. Nat. Bank v. Herron (1914), 73 Oreg. 301, 144 Pac. 661, L. R. A. 1916C, 125.

[42] See Montgomery v. Crossthwait (1889), 90 Ala. 553, 8 So. 498, 24 Am. St. R. 832, 12 L. R

No specific intention to ratify is essential. There must be a general intention, shown by words or conduct, to approve the act; if this appears, the legal consequence of ratification will follow, even though the principal had no specific purpose to cause that result, or even had a conscious purpose to avoid it.[43]

5. *What Amounts to a Ratification.*

§ 143. General rule.—Ratification may be either express or implied. There are cases in which it must be express or formal. It is a general rule that the act of ratification must be of the same nature as that which would be required to confer authority to do the ratified act in the first instance.[44] Thus if authority under seal would have been required, ratification by an instrument under seal is generally held to be necessary;[45] if written authority was requisite, ratification by writing is necessary.[46]

§ 144. —— Ratification by instrument under seal.—The tendency, however, is strong in modern times to abolish the rule which requires ratification under seal.

A. 140; McLeod v. Morrison (1912), 66 Wash. 683, 120 Pac. 528, 38 L. R. A. (N. S.), 783; Grant v. Beard (1870), 50 N. H. 129, Goddard's Cas. 125, Wambaugh's Cas. 1021.

[43] Compare St. Louis Gunning Adv. Co. v. Wanamaker (1905), 115 Mo. App. 270, 90 S. W. 737, Goddard's Cas. 155; Smith v. Fletcher (1899), 75 Minn. 189, 77 N. W. 800; Brown v. Henry (1899), 172 Mass. 559, 52 N. E. 1073, Goddard's Cas. 126; Trustees v. Bowman (1893), 136 N. Y. 521, 32 N. E. 987; Larson v. Marcy (1921), 61 Mont. 1, 201 Pac. 685.

[44] Thus, *e. g.*, where a city can contract only in a prescribed way, as by ordinance, it can ratify only in the same manner: Arnott v. Spokane (1893), 6 Wash. 442, 33 Pac. 1063; Zottman v. San Francisco (1862), 20 Cal. 96, 81 Am. Dec. 96, Goddard's Cas. 129.

[45] See Stetson v. Patten (1823), 2 Me. 358, 11 Am. Dec. 111, Wambaugh's Cas. 992; Heath v. Nutter (1862), 50 Me. 378, Goddard's Cas. 134.

But see Lagumis v. Gerard (1921), 116 N. Y. Misc. 471, 190 N. Y. Supp. 207, cited in a following note.

[46] See Hawkins v. McGroarty (1892), 110 Mo. 546, 19 S. W. 830, Mechem's Cas. 167; Judd v. Arnold (1884), 31 Minn. 430, 18 N. W. 151, Goddard's Cas. 132.

It has been greatly relaxed in partnership cases,[47] and in some states abandoned altogether.[48]

Here also, as in other cases, earlier referred to, if the instrument to be ratified was unnecessarily under seal, the ratification may generally be made without seal.[49]

§ 145. Ratification by authority subsequently conferred.—Ratification may be effected by subsequently conferring an authority antedating and sufficient to justify the act to be ratified, where that appears to have been the intention.[50]

But a mere authority to do acts in the future would not amount to a ratification of acts already done.[50a]

§ 146. Ratification by conduct—Estoppel.—Inasmuch as authority for the doing of most acts may be conferred by parol, the ratification of most acts may be effected by parol. This is the rule wherever some technical requirement like that of writing or sealing does not intervene. In the great majority of cases, ratification is inferred from conduct of any sort reasonably justifying the conclusion that the alleged principal approved the act as one done on his account;[51] and this is often done even though the principal had no express intention to ratify or even intended not to ratify. The principle of estoppel also applies here and where the principal by his words or conduct has led the other party to believe that the act done has his approval, he will not afterward be permitted to deny it to the prejudice of the other who has in good faith relied upon such apparent approval.

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[47] See Mechem's Elements of Partnership (2d Ed.) § 263.

[48] See McIntyre v. Park (1858), 11 Gray (Mass.) 102, 71 Am. Dec. 690, Mechem's Cas. 170; Holbrook v. Chamberlain (1874), 116 Mass. 155, 17 Am. Rep. 146.

It has been changed in several States by statutes which abolish or destroy the significance of seals. See McLeod v. Morrison (1912), 66 Wash. 683, 120 Pac. 528, 38 L. R. A. (N. S.), 783.

In Lagumis v. Gerard (1921), 116 N. Y. Misc. 471, 190 N. Y. Supp. 207, it is held that there may be ratification without seal of a contract under seal, relying on Harris v. Shorrall (1921), 230 N. Y. 343, 130 N. E. 572 as showing that the old rule respecting seals was obsolete in New York.

[49] See Bless v. Jenkins (1895), 129 Mo. 647, 31 S. W. 938, Goddard's Cas. 135; Adams v. Power (1872), 52 Miss. 828; Goldring v. Reid (1911), 61 Fla. 250, 54 So. 718.

Contra: Neely v. Stevens (1912), 138 Ga. 305, 75 S. E. 159.

[50] See Rice v. McLarren (1856), 42 Me. 157, Mechem's Cas. 190; Milliken v. Coombs (1821), 1 Me. 343, 10 Am. Dec. 70, Wambaugh's Cas. 990. Compare Moore v. Lockett (1810), 2 Bibb (Ky.) 67, 4 Am. Dec. 683; Stillman v. Fitzgerald (1887), 37 Minn. 186, 33 N. W. 564.

[50a] See Britt v. Gordon (1906), 132 Iowa 431, 108 N. W. 319, 11 Ann. Cas. 407.

§ 147. —— Two distinct ideas are involved here. The first is the question whether the conduct of the alleged principal has been such as to warrant any reasonable man conversant with the facts, *e. g.*, the jury, in inferring as a matter of fact, that the principal has ratified the act. This conduct need not be such as has, in fact, misled the other party into acting upon it.

The second is the question whether, while the conduct of the principal might not justify an inference of ratification generally or justify such an inference by the ordinary reasonable person, it has nevertheless, under the circumstances known to the particular plaintiff, reasonably led him into believing that the principal approved the act and, in consequence of such belief, changing his position to his detriment.

§ 148. —— **By accepting benefits.**—One of the most common methods of ratifying an act is by accepting the benefits of it; and it is the general rule that a person who, with knowledge of the facts, accepts the benefits of the act, must accept also its responsibilities.[52] This may include assuming responsibility for the acts and promises of the agent by means of which those benefits were secured.

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[51] See Ralphs v. Hensler (1893), 97 Cal. 296, 32 Pac. 243, Goddard's Cas. 137; Hartlove v. Fait (1899), 89 Md. 254, 43 Atl. 62, Goddard's Cas. 138; Sanders v. Peck (1898), 30 C. C. A. 530, 87 Fed. 61, Goddard's Cas. 140; Tebbetts v. Moore (1849), 19 N. H. 369, Goddard's Cas. 142; Woods v. Francklyn (1892), 19 N. Y. Supp. 377, 46 N. Y. St. Rep. 396, Goddards Cas. 143; Gillett v. Whiting (1894), 141 N. Y. 71, 35 N. E. 939, 38 Am. St. R. 762.

Unless the trial judge rightly decides that only one inference can properly be drawn from the facts, the question whether upon all the facts there is sufficient evidence of ratification, is for the jury to decide. See Dixon v. Savings Bank (1897), 102 Ga. 461, 31 S. E. 96, 66 Am. St. R. 193.

This rule, however, is one which must be applied with certain qualifications. The reception of the benefits must not only be with knowledge, but it must be *voluntary*. Benefits forced upon another without his consent, benefits so inextricably commingled with other matters not involved as to be impossible of rejection, benefits consumed in use or disposed of without knowledge, and the like, are not enough.[53]

§ 149. —— So the reception of the benefits must be *confirmatory*, that is, it must be the taking of something to which the principal would not be entitled unless he confirmed the act. If he would have been then and there entitled to the same thing independently of the act in question, his taking of it can ordinarily not amount to a ratification.[54]

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[52] See § 138; Hyatt v. Clark (1890), 118 N. Y. 563, 23 N. E. 891, Mechem's Cas. 177; Jones v. Atkinson (1880), 68 Ala. 167, Mechem's Cas. 192; Thacher v. Pray (1873), 113 Mass. 291, 18 Am. Rep. 480, Mechem's Cas. 204; Mayer v. Dean (1889), 115 N. Y. 556, 22 N. E. 261, 5 L. R. A. 540; Mining Co. v. Bank (1899), 95 Fed. 23, 36 C. C. A. 633; Thomas v. City Nat. Bank (1894), 40 Neb. 501, 58 N. W. 943, 24 L. R. A. 263; Reed v. Morton (1888), 24 Neb. 760, 40 N. W. 282, 8 Am. St. R. 247, 1 L. R. A. 736; Savings Bank v. Butchers' Bank (1891), 107 Mo. 133, 17 S. W. 644, 28 Am. St. R. 405; Gunther v. Ullrich (1892), 82 Wis. 220, 52 N. W. 88, 33 Am. St. R. 32; Hitchcock v. Griffin Co. (1894), 99 Mich. 447, 58 N. W. 373, 41 Am. St. R. 624; McAdow v. Railway Co. (1917), 100 Kan. 309, 164 Pac. 177, L. R. A. 1917E, 539; Reversion Fund Co. v. Maison Cosway [1913], 1 K. B. 364, Ann. Cas. 1913E, 1106, and Note on effect of retaining money borrowed by agent in excess of authority.

[53] See Bryant v. Moore (1846), 26 Me. 84, 45 Am. Dec. 96, Mechem's Cas. 355; Williams v. Storm (1869), 46 Tenn. (6 Cold.) 203, Goddard's Cas. 153; Martin v. Hickman (1897), 64 Ark. 217, 41 S. W. 852.

[54] See White v. Sanders (1850), 32 Me. 188, Wambaugh's Cas. 1003; Baldwin Fertilizer Co. v. Thompson (1898), 106 Ga. 480, 32 S. E. 591.

Furthermore, the receipt must have been by the principal himself or by some authorized person for him. It is not enough, for example, that the benefit in question came only to the hands of the unauthorized agent as the proceeds of his unauthorized act.[55]

§ 150. —— Where the principal receives the benefit without knowledge,—so that his receipt alone would not constitute a ratification—he may return it when he receives knowledge, but his voluntary retention of it after knowledge may have the same effect as a ratification as would his voluntary receipt of it with knowledge.[56]

This is said not to be true where what he has received is current money paid to him by the agent and received by him in good faith in payment of an existing debt; not to return it when he later learns that the money was the fruit of an unauthorized act of agency is held not to be a ratification.[57]

§ 151. —— **By bringing suit.**—Another common method of ratifying is by bringing suit based upon, and for the enforcement of the act. This, when done with a knowledge of the facts, shows an intention to take the benefits of the act, and the burdens must be taken with the benefits.[58]

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[55] See First Nat. Bank v. Oberne (1886), 121 Ill. 25, 7 N. E. 85; Baldwin v. Burrows (1872), 47 N. Y. 199, Mechem's Cas. 196.

[56] See Haney School Furn. Co. v. Hightower Institute (1901), 113 Ga. 289, 38 S. E. 761, Goddard's Cas. 145; Coykendall v. Constable (1885), 99 N. Y. 309, 1 N. E. 884, Goddard's Cas. 150; Wright v. Methodist Church (1898), 72 Minn. 78, 74 N. W. 1015.

[57] See Thacher v. Pray (1873), 113 Mass. 291, 18 Am. Rep. 480, Mechem's Cas. 204; Baldwin v. Burrows, *supra;* Russ v. Hansen (1903), 119 Iowa 375, 93 N. W. 502; Case v. Packing Co. (1904), 105 Mo. App. 168, 79 S. W. 732.

[58] See Shoninger v. Peabody (1889), 57 Conn. 42, 17 Atl. 278, 14 Am. St. R. 88, Mechem's Cas. 172; Roberts v. Rumley, 58 Iowa, 301, 12 N. W. 323, Mechem's Cas. 143; Park Bros. v. Kelly Axe Mfg. Co. (1892), 49 Fed. 618, 1 C. C. A. 395; Pickle v. Muse (1890), 88 Tenn. 380, 12 S. W. 919, 17 Am. St. R. 900, 7 L. R. A. 93; Wheeler & Wilson Mfg. Co. v. Aughey (1891), 144 Pa. St. 398, 22 Atl. 667, 27 Am. St. R. 638, Mechem's Cas. 152; LaGrande Nat. Bank v. Blum (1895) 27

Although to begin suit without knowledge of the facts relating to the unauthorized act would not ordinarily amount to ratification, to press for judgment after the facts are disclosed may have the same effect as beginning the action with knowledge.[59]

This rule, however, that suing works a ratification would not apply to suits brought for the purpose of avoiding or repudiating the unauthorized act, or to suits brought to prevent loss by it.

Basing a legal defense upon the act may, of course, have the same effect as making it the ground for an action.[60]

§ 152. —— By acquiescence—Silence.—When a person learns that another has assumed, without authority, to do some act for him as his agent, it is ordinarily said that he has the option to repudiate or ratify the act, but that he must do one thing or the other. This would be true wherever, according to the ordinary usages and practices of mankind, a failure to repudiate might fairly and reasonably be interpreted, under the circumstances, as indicating an intention to ratify. In such a case, the principal, it is commonly said, has a reasonable time within which to decide, but if, with knowledge of the facts, he fails to repudiate the act within a reasonable time, he may be held to have affirmed it.[61] Whether the case is such a one as

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Oreg. 215, 41 Pac. 659, Goddard's Cas. 165; Nichols v. Shaffer (1886), 63 Mich. 599, 30 N. W. 383, Goddard's Cas. 166; Nye v. Swan (1892), 49 Minn. 431, 52 N. W. 39, Goddard's Cas. 167.

Suit by principal against agent to recover from him the proceeds of the act, as ratification so as to prevent later claim of lack of authority as to third person: Izaguirre v. Gonzales (1917), 239 Fed. 600, L. R. A. 1917D, 697, with Note.

[59] See Farmers' Bank v. Farmers' Bank (1896), 49 Neb. 379, 68 N. W. 488. Compare Owensboro Wagon Co. v. Wilson (1909), 79 Kan. 633, 101 Pac. 4, with Shoninger v. Peabody, *supra*.

[60] See Edgar v. Breck (1899), 172 Mass. 581, 52 N. E. 1083.

[61] See Philadelphia, etc., R. Co. v. Cowell (1857), 28 Pa. 329, 70 Am. Dec. 128, Wambaugh's Cas. 1008; Hazard v. Spears (1868), 4 Keyes (N. Y.) 469, 2 Abb. 353, Mechem's Cas. 182; Heyn v. O'Hagen (1886), 60 Mich. 150, 26 N. W. 861, Mechem's Cas. 186; Mobile, etc., Ry. Co. v. Jay (1880), 65 Ala. 113, Goddard's Cas. 159; Whiteley v. James (1904), 121 Ga. 521, 49 S. E. 600, Goddard's

to justify this inference, is ordinarily a question of fact for the jury.[62] Some of the cases insist upon the element of estoppel,[63] but an estoppel to deny ratification, and a justifiable inference of an approval in fact, do not necessarily spring from the same circumstances. There may be either, according as the facts justify.

§ 153. —— This rule, that an inference of approval may properly be drawn from silence under many circumstances, applies, according to the weight of authority, whether the person who did the unauthorized act was an agent for other purposes or a mere stranger who had volunteered to act as agent;[64] though ratification is less readily presumed where the person was such a stranger,[65] and many cases deny the legitimacy of an inference of approval from mere silence altogether.[66]

Cas. 161; Ketchem v. Marsland (1896), 18 N. Y. Misc. 450, 42 N. Y. Supp. 7, Goddard's Cas. 163; Robbins v. Blanding (1902), 87 Minn. 246, 91 N. W. 844; Cooper v. Mulder (1889), 74 Mich. 374, 41 N. W. 1084; Owens Pottery Co. v. Turnbull (1903), 75 Conn. 628, 54 Atl. 1122; Foster v. Rockwell (1870), 104 Mass. 167; Reid v. Alaska Packing Co. (1905), 47 Oreg. 215, 83 Pac. 139; Lemcke v. Funk (1914), 78 Wash. 460, 139 Pac. 234, Ann. Cas. 1915D, 23; Thompson v. Laboringman's Merc. & Mfg. Co. (1906), 60 W. Va. 42, 53 S. E. 908, 6 L. R. A. (N. S.) 311, Goddard's Cas. 105; Raymond v. Palmer (1889), 41 La. Ann. 425, 6 So. 692, 17 Am. St. R. 398.

[62] See Philadelphia, etc., R. Co. v. Cowell, *supra;* Uniontown Grocery Co. v. Dawson (1910), 68 W. Va. 332, 60 S. E. 845, Ann. Cas. 1912B, 148.

Where only one inference could properly be drawn from the facts, the court, as in other similar cases, may decide it.

[63] See St. Louis Gunning Adv. Co. v. Wanamaker (1905), 115 Mo. App. 270, 90 S. W. 737, Goddard's Cas. 155.

[64] See Philadelphia, etc., R. Co. v. Cowell, *supra;* Heyn v. O'Hagen, *supra;* Uniontown Grocery Co. v. Dawson, *supra;* Terry v. Provident Fund Society (1895) 13 Ind. App. 1, 41 N. E. 18, 55 Am. St. R. 217.

[65] See Ladd v. Hildebrand (1870), 27 Wis. 135, 9 Am. Rep. 445.

[66] See Ward v. Williams (1861), 26 Ill. 447, 79 Am. Dec. 385; Britt v. Gordon (1906), 132 Iowa 431, 108 N. W. 319, 11 Ann. Cas. 407; Merritt v. Bissell (1898), 155 N. Y. 396, 50 N. E. 280.

6. *The Effect of Ratification.*

§ 154. In general.—The general effect of ratification under the conditions named, is, as stated in the familiar maxim, *Omnis ratihabitio retrotrahitur et mandato priori aequiparatur*, that the act becomes the act of the principal, with its benefits and burdens, from the beginning, as though he had previously authorized it to be done; except, that if the rights of third persons have intervened between the act and its ratification, such rights cannot be cut off by the ratification.

§ 155. —— Revocability.—Ratification, once intelligently and effectively made, is irrevocable, so far as the rights of third persons are concerned;[67] but, on the other hand, repudiation, unless it has led some one interested to change his situation to his detriment, may, it is said, ordinarily be subsequently changed to ratification.[68]

§ 156. Effect as between principal and agent.—As between the principal and the agent, the ordinary and general effect of the ratification with knowledge is to release the agent from all liability to the principal for acting without authority; and to give the agent the same rights against the principal,—as for compensation, reimbursement, etc.,—which he would have had if the act had been previously authorized.[69] The principal must ratify the whole act, and his conduct, it is held, will be liberally construed in favor of a ratification.[70]

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[67] See Jones v. Atkinson (1880), 68 Ala. 167, Mechem's Cas. 192; Perry v. Hudson (1852), 10 Ga. 362, Goddard's Cas. 183; Coffin v. Gephart (1865), 18 Iowa 256, Goddard's Cas. 185; Hunter v. Cobe (1901), 84 Minn. 187, 87 N. W. 612; Sanders v. Peck (1898), 87 Fed. 61, 30 C. C. A. 530.

[68] See Woodward v. Harlow (1856), 28 Vt. 338; Neely v. Jones (1880), 16 W. Va. 625, 37 Am. Rep. 794; Warder v. Cuthbert (1896), 99 Iowa 681, 68 N. W. 917.

[69] See Bank of Owensboro v. Western Bank (1877), 13 Bush. (Ky.) 526, 26 Am. Rep. 211, Mechem's Cas. 206; Wilson v. Dame (1878), 58 N. H. 392, Mechem's Cas. 526; Hazard v. Spears (1868), 4 Keyes (N. Y.) 469, 2 Abb. 353, Mechem's Cas. 182; Appeal of Berger (1880), 96 Pa. 443, Goddard's Cas. 186; Lingenfelder v. Leschen (1895), 134 Mo. 55, 34 S. W. 1089, Goddard's Cas. 188; Shepherd v. Gibbs (1891), 85 Mich. 85, 48 N. W. 179, Goddard's Cas. 194; Smith v. Cologan

§ 157. —— But this rule that ratification releases the agent from liability to the principal is subject to some necessary qualifications. The principal may have ratified and performed to the other party under such circumstances as to show that his purpose was merely to reduce the loss to the agent, and not to confirm or approve the act as to him.[71] And so where the agent, in violation of his instructions, has imposed a liability upon his principal, the fact that the principal discharges that liability by performance has no necessary tendency to show that he thereby releases the agent from responsibility for wrongfully imposing that liability upon him.[72]

§ 158. —— If the principal ratifies, he will be entitled to demand and receive from the agent anything possessed by the agent as a fruit of the agency, which he would have been entitled to demand and receive if the act had originally been authorized.[73]

§ 159. **Effect as to rights of other party against principal.** —As between the principal and the party with whom the agent dealt, the effect of the ratification is to give the other party the same rights against the principal which he would have had if the act had been previously authorized.[74] This is the aspect of

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(1787), 2 T. R. 188, n., Wambaugh's Cas. 989; Goss v. Stevens (1884), 32 Minn. 472, 21 N. W. 549, Goddard's Cas. 196; Brewer v. Sparrow (1827), 7 B. & C., 310, 14 Eng. Com. L. 144; Frixione v. Tagliaferro (1856), 10 Moore's Pr. Coun. Cas. 175.

[70] See Szymanski v. Plassan (1868), 20 La. Ann. 90, 96 Am. Dec. 382.

[71] See Triggs v. Jones (1891), 46 Minn. 277, 48 N. W. 1113, Goddard's Cas. 190.

[72] See Mechanics' Ins. Co. v. Rion (1901), — (Tenn. Ch.) —, 62 S. W. 44.

[73] See Schanz v. Martin (1902), 37 N. Y. Misc. 492, 75 N. Y. Supp. 997, Goddard's Cas. 192; Hormann v. Sherin (1894), 6 S. Dak. 82, 60 N. W. 145.

[74] See Heyn v. O'Hagen (1886), 60 Mich. 150, 26 N. W. 861, Mechem's Cas. 186; Hyatt v. Clark (1890), 118 N. Y. 563, 23 N. E. 891, Mechem's Cas. 177; Dempsey v. Chambers (1891), 154 Mass.

the question most frequently arising, and the rule is declared in the familiar maxim, *Omnis ratihabitio retrotrahitur et mandato priori aequiparatur.*

It seems to require no extended discussion here, because this entire chapter is chiefly devoted to it. The rule, as has been stated, applies to torts as well as contracts and acts relating to contracts or contractual relations.

§ 160. Effect as to rights of principal against other party on contracts.—The ratification of the act by the principal, being equivalent to prior authority, will operate to cut off any remedies which he might otherwise have had against the other party based upon the want of authority, as, for example, the right to recover property or money received by the other party from the agent.

Whether the principal by ratifying it can acquire the same right to enforce against the other party a contract made on his behalf which he would have had if it had been previously authorized, is a question upon which the cases are in some conflict.

According to one view (Wisconsin), the transaction cannot operate as a contract because it was made by the agent without authority; it cannot operate as an offer, which the principal may now accept, because it was not made as such; there must be some new act of the other party showing his present consent to treat the contract as operative.[75]

§ 161. —— According to another view (English), the transaction amounts to a sort of present conditional contract, the condition being that the principal shall supply the lacking authority by ratification; and the principal may so ratify within a reasonable time, even though the other party has in the meantime attempted to withdraw.[76]

330, 28 N. E. 279, 26 Am. St. R. 249, 13 L. R. A. 219, Goddard's Cas. 197, Wambaugh's Cas. 1030; Avakian v. Noble (1898), 121 Cal. 216, 53 Pac. 559.

[75] See Dodge v. Hopkins (1861), 14 Wis. 686, Mechem's Cas. 215. Wambaugh's Cas. 1044; Atlee v. Bartholomew (1881), 69 Wis. 43, 33 N. W. 110, 5 Am. St. R. 103.

[76] Bolton Partners v. Lambert (1889), 41 Ch. Div. 295, Mechem's Cas. 222, Wambaugh's Cas. 1053; *In re* Tiedemann [1899], 2 Q. B. 66; Bosanquet's Case, (1890), 45 Ch. Div. 16.

Another view is that the transaction, while it cannot operate as a contract, constitutes a sort of continuing offer, which may of course be withdrawn before acceptance, but, if not so withdrawn, a ratification within a reasonable time will operate as an acceptance of the offer and thus create a valid contract which may be enforced by either party.

The rule sustained by the weight of authority seems to be to that effect, namely, that the principal may ratify the unauthorized contract and then enforce it against the other party, if he does so within a reasonable time and before the other party has withdrawn from it.[77]

§ 162. —— Effect as to notices, demands, etc.—The question may arise as to other acts than contracts or torts, as, for example, to notices to quit, demands for payment or performance, and the like. Here the courts are properly reluctant to put the other party into a situation where he must act at peril. Thus, with regard to an unauthorized notice to quit to terminate a tenancy, where if the tenant quits and the notice is not ratified he will be in the wrong or if he does not quit and the notice is ratified he will again be in the wrong, it is held that he is entitled to a valid notice at the time he is called upon to act.[78] It is so held also with reference to a notice to a carrier to stop goods in transit,[79] and to the exercise of options which are to be determined within a prescribed time,[80] to demands of payment or delivery which will put the other party in default,[81] and the like.

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[77] See McClintock v. South Penn Oil Co. (1892), 146 Pa. 144, 23 Atl. 211, 28 Am. St. R. 785, Mechem's Cas. 219; Steinfeld v. Broxholme (1922), — Cal. App. —, 211 Pac. 473; Baldwin v. Schiappacasse (1896), 109 Mich. 170, 66 N. W. 1091; Cowan v. Curran (1905), 216 Ill. 598, 75 N. E. 322; Aetna Ins. Co. v. Stanbaugh (1907), 76 Ohio St. 138, 81 N. E. 173, 118 Am. St. R. 834; Atlanta Buggy Co. v. Hess Spring Co. (1905), 124 Ga. 338, 52 S. E. 613, 4 L. R. A. (N. S.) 431; Kline Bros v. Royal Ins. Co. (1911), 192 Fed. 378; Security Loan & Tr. Co. v. Powell (1916), 119 Va. 231. In addition to the discussions referred to in the notes to the cases, see 25 Amer. L. Rev. 74; 9 Harv. L. Review, 60; 5 Law Quar. Rev. 440; Fry on Specific Performance (3d Eng. ed.), 711.

[78] See Pickard v. Perley (1864), 45 N. H. 188, 86 Am. Dec. 153; Brahn v. Jersey City Forge Co. (1875), 38 N. J. L. 74; McCorskey v. Hamilton (1899), 108 Ga. 640, 34 S. E. 111, 75 Am. St. R. 79; Right v. Cuthell (1804), 5 East 491, Wambaugh's Cas. 1034.

On the other hand, subsequent ratification will, it is said, uphold the unauthorized commencement of an action,[82] or the declaring of a debt to be at once due because of non-payment of interest or installments of principal.[83]

§ 163. Effect between agent and other party—In contract.—A person who assumes to deal as agent with third parties in matters concerning which he has no authority incurs, in many instances, as will be seen hereafter,[84] an individual liability to the person so dealt with. As between such other party and the agent of a disclosed principal, the effect of the ratification in contract cases is, ordinarily and if effected while the situation remains unchanged,[85] to release the agent from liability to the other party for having made a contract without authority;[86] and it gives the agent the same rights against the other party which he would have had if the contract had been previously authorized.

The agent would probably not be released if and where ratification by a wholly undisclosed principal were permitted. The other party would doubtless then be placed in the same situation as in any case of undisclosed principal, *i. e.*, with a right of choice.

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[79] See Bird v. Brown (1850), 4 Exch. 786, Wambaugh's Cas. 1040.

[80] See Holland v. King (1848), 6 Com. B. 727, 136 Eng. Rep. 1433; Dibbins v. Dibbins [1896], 2 Ch. 348.

[81] See Solomons v. Dawes (1794), 1 Esp. 83; Coore v. Callaway (1794), 1 Esp. 115; Coles v. Belle (1808), 1 Camp. 478, n., 10 Rev. Rep. 731, n.

[82] See Ancona v. Marks (1862), 7 H. & N. 686, Wambaugh's Cas. 1014.

[83] See Farmers' L. & T. Co. v. Memphis, etc., R. Co. (1897), 83 Fed. 870, Goddard's Cas. 201.

[84] See *post* §§ 351, 352.

[85] In Sheffield v. Ladue (1871), 16 Minn. 388, 10 Am. Rep. 145, it is said that ratification would not be effective after an action brought against the agent or in any case in which it would cause substantial injury to the other party.

[86] See Spittle v. Lavender (1821), 2 Brod. & B. 452, 6 Eng. Com. L. 224; Lingenfelder v. Leschen (1895), 134 Mo. 55, 34 S. W. 1089, Goddard's Cas. 188; Appeal of Berger (1880), 96 Pa. 443, Goddard's Cas. 186.

§ 164. —— **In tort.**—But in cases of tort, the rule is different since agency usually is no defense to a tort. The ratification by the principal makes him liable also for the tort to the third person, but it does not release the agent from his liability to the third person for his participation in the tort. Both principal and agent are thereafter liable. It is no defense to the agent when sued for a tort that he acted as the authorized agent of another in committing it.[87]

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[87] See Stephens v. Elwall (1815), 4 Maule & Sel. 259, Mechem's Cas. 226; Delaney v. Rochereau (1882), 34 La. Ann. 1123, 44 Am. Rep. 456, Mechem's Cas. 514; Osborne v. Morgan (1881), 130 Mass. 102, 39 Am. Rep. 437, Mechem's Cas. 518; Miller v. Wilson (1896), 98 Ga. 567, 25 S. E. 578, 58 Am. St. R. 319.

CHAPTER VII.

OF DELEGATION OF AUTHORITY OR APPOINTMENT OF OTHER AGENTS BY THE AGENT.

§165. In general.
166. Agent may be authorized to appoint other agents.
167, 168. Delegation of authority distinguishable from such appointments.
169. The case of the independent contractor.
170-172. Agent generally may not delegate authority to sub-agent.
173-179. Under what circumstances appointment or delegation justified.
180, 181. Effect of appointment or delegation.
182. —— Sub-servants.

§ 165. **In general.**—Thus far there has been considered the question of the appointment of agents by the principal himself, before the act was done—by authorization, and his approval of a previously unauthorized act after it was done—by ratification. Some consideration is required of the question whether authority can be conferred not by the principal himself but by some one else to whom that power has been confided.

§ 166. **Agent may be authorized to appoint other agents.**—There can be no doubt, of course, that the principal may either expressly or by implication authorize an agent to employ other agents, as where the manager of a business or one put in charge of any other enterprise is clothed with the power of employing all such servants and agents as the conduct of the business may require.[1] In such cases, employment of agents by the agent

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[1] See Haluptzok v. Great Northern Ry. Co. (1893), 55 Minn. 446, 57 N. W. 144, 26 L. R. A. 739, Wambaugh's Cas. 947; Gwilliam v. Twist [1895], 2 Q. B. 84, Wambaugh's Cas. 951; Banks v. Southern Express Co. (1905), 73 S. Car. 211, 53 S. E. 166; Katzenstein v. Raleigh R. Co. (1881), 84 N. Car. 688; Louisville, etc., R. Co. v. Blair (1873), 1 Tenn. Ch. 351, Goddard's Cas. 487; Blowers v. Southern Ry. (1906), 74 S. Car. 221, 54 S. E. 368, Goddard's Cas. 488.

As to employment of physicians

authorized to employ them, within the scope of the employment, is in legal effect an appointment by the principal under the general maxim *Qui facit per alium, facit per se,* and the agents so appointed are the agents of the principal as fully as though appointed by him in person.

Such an agent may be authorized to appoint agents to act for the principal in respect of matters concerning which the appointing agent has no authority to act in person.

As a general rule, however, an agent by merely being authorized to do a given act, has no implied authority to appoint other agents for his principal to do other acts. Only where it was a reasonably necessary and proper incident of the act which he was authorized to perform, or where it was justified by an established custom, might he ordinarily do it.

§ 167. Delegation of authority distinguishable from such appointments.—Another and a different question is, not whether an agent may thus be authorized to appoint agents who will derive their authority from the principal, but whether an agent who has been given certain authority may himself hand that authority over in whole or in part to another, who is to exercise it either for or under him. It is the question, not whether an agent may be authorized to appoint other agents, but whether he may appoint sub-agents. The difference may be seen by inquiring whether an agent appointed by an agent is the agent of the principal or the agent of the agent.

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by conductors, station agents, etc., to assist or care for injured persons, see *post* § 280, n: Terre Haute, etc., R. Co. v. McMurray (1884), 98 Ind. 358, 49 Am. Rep. 752; Louisville, etc., Ry. Co. v. Smith (1889), 121 Ind. 353, 22 N. E. 775, 6 L. R. A. 320; Arkansas, etc., Ry. Co. v. Loughridge (1898), 65 Ark. 300, 45 S. W. 907; Union Pac. Ry. Co. v. Beatty (1886), 35 Kan. 265, 57 Am. Rep. 160, 10 Pac. 845; Peninsular R. Co. v. Gary (1886), 22 Fla. 356, 1 Am. St. R. 194; Godshaw v. Struck (1900), 109 Ky. 285, 22 Ky. L. R. 820, 58 S. W. 781, 51 L. R. A. 668; Spelman v. G. C. & M. Co. (1901), 26 Mont. 76, 66 Pac. 597, 91 Am. St. R. 402, 55 L. R. A. 640; Holmes v. McAllister (1900), 123 Mich. 493, 82 N. W. 220, 48 L. R. A. 396; Habbegger v. King (1912), 149 Wis. 1, 135 N. W. 166, 39 L. R. A. (N. S.), 881, Ann. Cas. 1913C, 828.

The act of handing down authority conferred is frequently spoken of as *delegation* of the authority, and the question arises in other departments of the law than agency.

Both questions may, of course, at times arise with respect of the same agent, that is, he may be one who may both appoint other agents and also delegate his own authority.

§ 168. —— The practical problems which are likely to arise may be more fully stated thus:—If the agent appoints a sub-agent, whose agent is he—is he the agent of the principal or of the agent only, if of anyone? Who is liable for his acts? Who must pay him his compensation? To whom is he responsible for not acting or for acting improperly? If he is, by the agent, given possession of property entrusted by the principal to the agent, is his possession with the principal's implied consent (and therefore not wrongful) or is it without such consent (and therefore perhaps a conversion)? If a sub-agent be employed and be guilty of negligence, must the agent answer for it to the principal, or may the latter look only to the sub-agent?

§ 169. The case of the independent contractor.—But a third situation is also possible. The person concerned—the so-called agent—may not be an *agent* at all, but an *independent contractor*, as explained in an earlier section. In such a case he is often *expected* to employ the appropriate agencies and to supply the necessary equipment, but they are to be employed as his own. The persons he employs are therefore not the agents or servants of the proprietor (the person for whom the work is undertaken), but of the contractor who must answer for their performance.

With this much of preliminary discussion, attention may next be directed to some of the general rules.

§ 170. Agent generally may not delegate authority to sub-agent.—It is the general rule, finding expression in the familiar maxim, *Delegatus non potest delegari*, that an agent may not delegate his authority to a sub-agent, without the expressed or implied consent of his principal.[2] This is regularly the rule where the act to be performed requires the exercise of judgment or discretion, or where for other reasons the principal evidently trusted to a personal performance by the agent.

The rule is based upon the presumption that the principal has selected the particular agent because he relied upon, or desired the benefit of, that particular person's judgment, discretion, experience, skill or ability, or at least was willing to take the risk of that person's conduct, and it would be a manifest injustice, as well as a disappointment of expectations, if the person so selected could turn the matter over to another of whom the principal may be ignorant and to whom he might not be willing to entrust the authority.

The rule applies, in general, as much to delegation by a servant as by an agent.[3]

§ **171.** —— The considerations which apply here also forbid the agent's doing what is really the same thing under another name, that is, assigning his contract of agency. "In the case of such a contract," it is said in a recent case, "it is a presumption of law that the trust is exclusively personal, and that it cannot be transferred or delegated by the agent without his principal's consent."[4]

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[2] See Catlin v. Bell (1815), 4 Camp. 183, Goddard's Cas. 483, Wambaugh's Cas. 928; Bonwell v. Howes (1888), 15 Daly (N. Y.) 43, 2 N. Y. Supp. 717, Goddard's Cas. 484; Loomis v. Conger (1862), 13 Iowa 532, Wambaugh's Cas. 931; Doggett v. Greene (1912), 254 Ill. 134, 98 N. E. 219, Ann. Cas. 1913B, 1166; Kinkead v. Hartley (1913), 161 Iowa 613, 143 N. W. 591, Ann. Cas. 1915D, 1, with Note; Appleton Bank v. McGilvray (1855), 4 Gray (Mass.), 518, 64 Am. Dec. 92, Mechem's Cas. 229; Birdsall v. Clark, (1878), 73 N. Y. 73, 29 Am. Rep. 105, Mechem's Cas. 231; McKinnon v. Vollmar (1889), 75 Wis. 82, 43 N. W. 800, 17 Am. St. R. 178, 6 L. R. A. 121; Davis v. King (1895), 66 Conn. 465, 34 Atl. 107, 50 Am. St. R. 104 and exhaustive note; Central, etc., Ry. Co. v. Price (1898), 106 Ga. 176, 32 S. E. 77, 71 Am. St. R. 246, 43 L. R. A. 402.

[3] See a fuller discussion of this aspect, *post* § 513.

[4] Bancroft v. Scribner (1896), 72 Fed. 988, 44 U. S. App. 480, 21 C. C. A. 352. See also Peterson v. Christensen (1880), 26 Minn. 377, 4 N. W. 623, Mechem's Cas. 234.

§ 172. —— The rule, however, is not without certain real or apparent exceptions or qualifications. It is based upon the presumed intention of the principal and is intended for his protection. There are cases, moreover, wherein the reason is not present, and the rule should not then prevail. If the case does not involve the exercise of any special skill, judgment or discretion, or, though it does, if it appears that the principal is willing that the authority may be delegated, then exceptions should be recognized, and the law admits them.

The most important of the real or apparent exceptions which apply to any of the situations already discussed may now be considered. Some of them, as will be observed, are cases of appointment rather than delegation.

§ 173. Under what circumstances delegation or appointment justified.—Unless the contrary is expressed, authority to appoint, employ or use a sub-agent may be implied—

§ 174. —— 1. Where the act to be done is mechanical or ministerial only. Thus an agent authorized to grant insurance, make and deliver a deed, execute a note or other contract, and the like, having personally performed the essential and substantial part of deciding upon the matters involving judgment or discretion,—such as the choice of parties and the questions of the time, place, amount, conditions and terms of performance—might then lawfully use the hand of another to perform the purely mechanical part of writing or signing the documents under his direction.[5] No contractual relation ordinarily exists in such a case between the principal and the substitute. The acts of the latter are the acts of the agent, but if within the agent's authority, such acts may be treated as the acts of the principal by the agent.[6]

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[5] See Commercial Bank v. Norton (1841), 1 Hill (N. Y.), 501, Wambaugh's Cas. 939; Eldridge v. Holway (1857), 18 Ill. 445, Goddard's Cas. 485; Norwich University v. Denny (1874), 47 Vt. 13, Goddard's Cas. 486; compare Barret v. Rhen (1869), 69 Ky. (6 Bush) 466.

[6] Bodine v. Exchange Ins. Co. (1872), 51 N. Y. 117, 10 Am. Rep. 566; Arff v. Star F. Ins. Co.

§ 175. —— 2. Where the proper conduct of the business requires it. Thus if a note were sent to a bank for collection and the protection of the principal required that the note should be protested, the authority of the bank to employ the proper officer for that purpose would be implied, and the bank would not be liable for the notary's default if he had been selected with due care.[7] So if a claim were placed in the hands of an agent for collection under circumstances involving the bringing of an action, authority in the agent to employ the necessary attorney or officer for the principal would be implied.[8]

§ 176. —— 3. Where the employment is in accordance with a known and well established usage. Thus where a commission merchant was employed in Boston to buy cotton in New Orleans, and in accordance with the custom of that market employed a broker there to make the purchase, it was held that this was not a breach of duty to his principal. The court said, "The employment of a broker to effect the purchase, was a justifiable delegation of authority to a sub-agent, because this was the usual and known custom of the New Orleans market."[9]

§ 177. —— 4. Where the circumstances were such that it was evidently contemplated, at the time the agent was appointed, that sub-agents would be employed. Thus in a case quite like the last one where the principal and the agent were both residents of California and the authority was to sell land in Texas, it was held that there was implied authority to employ a local

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(1890), 125 N. Y. 57, 25 N. E. 1073, 21 Am. St. R. 721, 10 L. R. A. 609; Rohrbough v. U. S. Express Co. (1901), 50 W. Va. 148, 40 S. E. 398, 88 Am. St. R. 849; Grady v. American, etc., Ins. Co. (1875), 60 Mo. 116, Mechem's Cas. 238; McKinnon v. Vollmar (1889), 75 Wis. 82, 43 N. W. 800, 17 Am. St. R. 178, 6 L. R. A. 121; Weaver v. Carnall (1879), 35 Ark. 198, 37 Am. Rep. 22. Compare Haralson v. Stein (1874), 50 Ala. 347, Mechem's Cas. 236.

[7] See Tiernan v. Commercial Bank (1843), 7 How. (Miss.) 648, 40 Am. Dec. 83.

[8] See Strong v. West (1900), 110 Ga. 382, 35 S. E. 693.

[9] See Darling v. Stanwood (1867), 96 Mass. 504, Goddard's Cas. 489, (provided that he used due care in his selection).

sub-agent who could recover compensation from the principal. The court said, "It is a fair presumption growing out of the exigencies of the transaction that it was contemplated that a purchaser should be obtained through a sub-agent."[10]

§ 178. —— 5. When necessity or sudden emergency justifies it. Thus it has been held that when a railroad train in transit was suddenly deprived of an essential man, *e. g.*, the brakeman, *e. g.*, by sudden illness, the conductor would have implied authority to employ a temporary substitute;[11] and it would doubtless be so held if the conductor himself were suddenly disabled and delegated the performance of his duties to another. But this doctrine of necessity is narrowly applied and is usually dependent not only upon the emergency but also upon the inability or impracticability of communicating with the principal and the necessity of going forward in the meantime.[12]

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[10] See Eastland v. Maney (1904), 36 Tex. Civ. App. 147, 81 S. W. 574. See also Kinkead v. Hartley (1913), 161 Iowa 613, 143 N. W. 591, Ann. Cas. 1915D, 1. with extended Note.

Collection agents and agencies—The question whether a bank receiving a check, draft, or note, payable at another place, is thereby, by implication, authorized to employ another bank at the place of collection to receive and transmit the proceeds, *as the agent of the owner* and at his risk (if due care be used in the selection of the correspondent bank), or whether such correspondent is to be deemed *the agent of the sending bank* only, so as to make the latter responsible for the defaults of the correspondent, is one upon which the cases are in conflict. The English courts, the Supreme court of the United States, and the courts of many states such as New York, Georgia, Kansas, Louisiana, Michigan, Minnesota, Montana, New Jersey, Ohio, adopt the former view where the parties have not agreed upon any other basis.

Massachusetts, Connecticut, Illinois, Indiana, Iowa, Maryland, Mississippi, Missouri, Nebraska, Pennsylvania, South Dakota, Tennessee, Wisconsin, and others, adopt the latter view.

See Mackersy v. Ramsays (1843), 9 Cl. & Fin. 818; Exchange National Bank v. Third Nat. Bank (1884), 112 U. S. 276, 28 L. Ed. 722, 5 Sup. Ct. 141, Mechem's Cas. 239; Simpson v. Waldby (1886), 63 Mich. 439, 30 N. W. 199, Goddard's Cas. 493; Allen v. Merchants Bank (1839), 22 Wend. (N. Y.) 215, 34 Am. Dec. 289, Wambaugh's Cas. 936; Bailie v. Augusta Sav. Bank (1894), 95 Ga. 277, 21 S. E. 717, 51 Am. St. R. 74; Dorchester Bank v. New England Bank (1848), 55 Mass. (1 Cush.) 177, Wambaugh's Cas. 942; Bank of Rocky Mt. v. Floyd (1906), 142 N. Car. 187, 55 S. E. 95, Goddard's Cas. 498; Guelich v. Nat. Bank (1881), 56 Iowa 434, 9 N. W. 328, 41 Am. Rep. 110.

Attorneys at law, collection agents, and express companies taking claims *for collection* without limiting their liability are usually held responsible for the defaults of their correspondents.

See Cummins v. Heald (1880), 24 Kan. 600, 36 Am. Rep. 264, Mechem's Cas. 247; Bradstreet v. Everson (1872), 72 Pa. 124, 13 Am. Rep. 665, Goddard's Cas. 490; Hoover v. Wise (1876), 91 U. S. 308, 23 L. Ed. 392; Weyerhauser v. Dun (1885), 100 N. Y. 150, 2 N. E. 274; American Express Co. v. Haire (1863), 21 Ind. 4, 83 Am. Dec. 334.

§ 179. —— 6. An appointment of a sub-agent, though not originally authorized, may be ratified by the principal in the same manner and with like effect, as in other cases.[13]

§ 180. Effect of appointment of or delegation to sub-agent.—If the sub-agent is employed with the express or implied consent of the principal, for him, and as his agent, then the sub-agent is to be regarded as the agent of the principal.[14] He is liable to the principal directly, and the original agent is not responsible to the principal for the acts of the sub-agent, unless he failed to exercise good faith and due care in his appointment.

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[11] See Georgia Pac. R. Co. v. Propst (1887), 85 Ala. 203, 4 So. 711; Sloan v. Cent. Ia. R. Co. (1883), 62 Iowa 728, 16 N. W. 331; Fox v. Chicago, etc., R. Co. (1892), 86 Iowa 368, 53 N. W. 259, 17 L. R. A. 289; Louisville, etc., R. Co. v. Ginley (1897), 100 Tenn. 472, 45 S. W. 348. Cases involving the right of such an employee to recover for injuries received in the service.

[12] See Gwilliam v. Twist, [1895], 2 Q. B. 84, Wambaugh's Cas. 951; Harris v. Fiat Motors (1906), 22 Times L. R. 556.

[13] See Saveland v. Green (1876), 40 Wis. 431.

[14] See Davis v. King (1895), 66 Conn. 465, 34 Atl. 107, 50 Am. St. R. 104, and note; Bradford v. Hanover Ins. Co. (1900), 102 Fed. 48, 43 C. C. A. 310, 49 L. R. A. 530; Franklin Fire Ins. Co. v. Bradford (1901), 201 Pa. 32, 50 Atl. 286, 88 Am. St. R. 770, 55 L. R. A. 408; Goode v. Georgia Ins. Co. (1895), 92 Va. 392, 23 S. E. 744, 53 Am. St. R. 817, 30 L. R. A. 842.

Notice to such a sub-agent would be notice to the principal within the rules applicable to that subject generally; and, in the same way and to the same extent, the principal would be responsible for his torts and contracts.

§ 181. —— If the employment of the sub-agent was not authorized by the principal as his agent, but merely as the agent of the agent, then the sub-agent is to be deemed the agent of the original agent only, and the latter is responsible to the principal for the acts of the sub-agent.[15] The principal would not be liable for his compensation.

Notice to such a sub-agent would not be imputed to the principal, and the latter would not be responsible for his torts or contracts except where they could be deemed to be the authorized acts of the original agent.

§ 182. —— **Sub-servants.**—In the case of what may be called, by analogy, the sub-servant, the considerations are in general the same. There are cases in which the employment may be deemed authorized, as in those of the so-called emergency or necessity.[16] Moreover, in many other cases a master has been held liable for the acts of a stranger assisting his servant,[17]—

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[15] See Barnard v. Coffin (1886), 141 Mass. 37, 6 N. E. 364, 55 Am. Rep. 443, Mechem's Cas. 249; Hoag v. Graves (1890), 81 Mich. 628, 46 N. W. 109, Goddard's Cas. 503; Waldman v. North British Ins. Co. (1890), 91 Ala. 170, 8 So. 666, 24 Am. St. R. 883; Hoover v. Wise (1875), 91 U. S. 308, 23 L. Ed. 392.

[16] See *ante*, § 178; Haluptzok v. Great Nor. Ry. Co. (1893), 55 Minn. 446, 57 N. W. 144, 26 L. R. A. 739, Wambaugh's Cas. 947.

[17] See Thyssen v. Davenport Ice Co. (1907), 134 Iowa 749, 112 N. W. 177, 13 L. R. A. (N. S.), 572; Levin v. Omaha (1918), 102 Neb. 328, 167 N. W. 214; Leavenworth Electric R. Co. v. Cusick (1899), 60 Kan. 590, 57 Pac. 519, 72 Am. St. R. 374.

In Indianapolis v. Lee (1921), — Ind. App. —, 132 N. E. 605, it is said: "It is generally held that where a servant, without express or implied authority from the master, suffers or permits a stranger to do, or to assist in doing, the work which the master intrusted to the servant, the master is liable under the rule of respondeat superior for an injury to a third person inflicted through the tortious act of the stranger. The liability of the master may not upon the ground that his employment could be deemed authorized, but usually upon one or the other of two additional grounds, namely, (1) that the act of the stranger was done under such conditions of actual control and direction by the servant as to be regarded as the servant's own act, or (2) that to permit the stranger to intervene was an act of negligence or misconduct on the part of the servant, while acting in the course of his employment, for which the master may be liable as in other cases. This matter will be considered further in a later section.[18]

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be made to rest on different grounds—according to the pleadings and the facts in the particular case. In some cases, as in the case at bar, it rests on the ground that the negligence of the stranger is in fact the negligence of the servant. In some cases it is made to rest on the ground that, where two or more persons participate in the commission of a tort, each one is liable for the entire damage. In the process of reasoning by which the master's liability is thus established, there is nothing new. It involves merely the application of the long established rules of law. Booth v. Mister (1835), 7 Carrington & Payne, 66; Chandler v. Broughton (1832), 1 Crompton & Meeson, 29, 3 Tyrw. 220; McLaughlin v. Pryor (1842), 4 Macn. & G. 58, 4 Scott, N. R. 655, Carrington & Marshmans, 354; Geiss v. Twin City Taxicab Co. (1913), 120 Minn. 368, 139 N. W. 611, 45 L. R. A. (N. S.) 382; Chicago v. O'Malley (1902), 196 Ill. 197, 63 N. E. 652; Andrews v. Boedecker (1888), 126 Ill. 605, 18 N. E. 651, 9 Am. St. Rep. 649; Althorf v. Wolfe (1860), 22 N. Y. 355; Wellman v. Miner (1897), 19 Misc. Rep. 644, 44 N. Y. Supp. 417; Gleason v. Amsdell (1880), 9 Daly (N. Y.) 393; James v. Muehlebach (1889), 34 Mo. App. 512; Simons v. Monier (1859), 29 Barb. (N. Y.) 419; Hill v. Sheehan (Super.) (1892), 20 N. Y. Supp. 529, 48 N. Y. St. R. 410; Bamberg v. International R. Co. (1907), 53 Misc. Rep. 403, 103 N. Y. Supp. 297; Bank of California v. Western U. Telegraph Co. (1877), 52 Cal. 280; P., C. & St. L. Ry. Co v. Kirk (1885), 102 Ind. 399, 1 N. E. 849, 52 Am. Rep. 675."

[18] See *post* § 513.

CHAPTER VIII.

OF THE TERMINATION OF THE AGENCY.

§183. In general.

I. TERMINATION BY ACT OF THE PARTIES.

184. What methods fall under this head.
185. Termination by original agreement.
186, 187. —— Accomplishment of object.
188. —— Expiration of time.
189. —— Happening of agreed event.
190. Termination by subsequent act of party.

1. *Termination by Mutual Consent.*

191. Agency may be terminated at any time by mutual consent.

2. *Revocation by Principal.*

192. Power of principal to revoke—Usually at any time.
193. —— Not so as to affect acts already done.
194-197. —— Not when given by way of security or coupled with an interest.
198. Contracts not to revoke an otherwise revocable authority.
199. How revoke.
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202. Power of agent to renounce authority.
203. Enforcement of contract of agency.
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II. TERMINATION BY OPERATION OF LAW.

207. In general.
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209. —— Death unknown.
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211. —— Death of joint principal or partner.
212. Death of agent.
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214. Bankruptcy of principal or agent.
215. Marriage of principal.
216. War.
217. Change in law.
218. Destruction, loss or sale of subject matter.
219. Termination of power over subject-matter—Sub-agents.
220. Notice of termination by operation of law.

§ 183. In general.—Having now given some attention to the question of how agency may be created, it may be well to consider next the question of how it may be terminated. The agency may be terminated in various ways which may be roughly classified under two heads.

1. Termination by the act of the parties.
2. Termination by operation of law.

I. Termination by Act of Parties.

§ 184. **What methods fall under this head.**—The agency may be terminated by the act of the parties either (a) because of some limitation or condition which the parties, expressly or by implication, attached to the agency at the time of its creation; or (b) by some act done by one or both of them at a later time with a view to terminate the relation. Shortly stated, then, termination by act of the parties may be either—

(*a*) By force of their original agreement; or

(*b*) By the subsequent act of one or both of them.

§ 185. **Termination by original agreement.**—Under this head, as has been stated, may be grouped the cases in which the authority will be terminated because of some condition or limitation either expressly or impliedly impressed upon it at the time of its creation.

By force of the original agreement, therefore, the agency is terminated in the following cases.

§ 186. —— **(1) Accomplishment of object.**—When the object for which it was created has been accomplished, the authority will ordinarily and *ipso facto* be terminated. Thus, if an agent has been appointed to do a certain act, and he does it, his authority will thereupon ordinarily be terminated; and he will have no implied authority either to repeat the act or to do other acts.[1] So if two agents are severally appointed to do the same act, and one of them does it, the authority of the other to do it will ordinarily be terminated. And if, in either case, before the agent does the act, the principal has done it for himself the authority of the agent will ordinarily be terminated.[2] And even though neither the principal nor the agent does the act, but it is done by someone else, the authority may be terminated.[3]

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[1] See Moore v. Stone (1875), 40 Iowa 259, Goddard's Cas. 207; Marbury v. Barnet (1896), 17 N. Y. Misc. 386, 40 N. Y. Supp. 76, Goddard's Cas. 209; Short v. Millard (1873), 68 Ill. 292; Campbell v. Chase (1908), 78 Kan. 593, 96 Pac. 949.

§ 187. —— It does not necessarily follow that, because the accomplishment of the object will terminate the authority, it will always continue until the object is accomplished. Experience may show that it can not be accomplished at all, or, in all events, not within any reasonable time. Great and unexpected changes in conditions may also justify or require the conclusion that the authority no longer exists.[4]

§ 188. —— (2) **Expiration of time.**—When the time originally fixed for its continuance has expired, the authority will also ordinarily *ipso facto* be terminated. Thus, an agent may in terms be appointed for a stated time or period, and his authority will ordinarily come to an end upon the expiration of that time or period. This is sometimes called termination by efflux of time. The same result may ensue less specifically where one is appointed to act "while I am away," "until my return," and the like.[5]

§ 189. —— (3) **Happening of agreed event.**—When some stipulated event happens or some agreed act is done, upon which the continuance of the authority was originally made to depend, the authority will ordinarily *ipso facto* be terminated. Thus, it is entirely competent for the parties to agree in advance that the agency shall come to an end, automatically or otherwise, upon the happening of some stated event, or to reserve to one party or the other the right to terminate it by some agreed notice or act.[6]

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[2] See Ahern v. Baker (1885), 34 Minn. 98, 24 N. W. 341, Mechem's Cas. 288, Goddard's Cas. 274, Wambaugh's Cas. 972.

[3] See Benoit v. Conway (1865), 92 Mass. (10 Allen) 528.

[4] Compare Proudfoot v. Wightman (1875), 78 Ill. 553; Hartford v. McGillicuddy (1907), 103 Me. 224, 68 Atl. 860, 16 L. R. A. (N. S.) 431, 12 Ann. Cas. 1083.

[5] See Danby v. Coutts (1885), L. R. 29 Ch. Div. 500; Gundlach v. Fischer (1871), 59 Ill. 172; Rundle v. Cutting (1893), 18 Colo. 337, 32 Pac. 994; Herd v. Bank (1896), 66 Mo. App. 643.

The rules above stated are all subject to the qualification that if the authority in question had been given, by the principal, the appearance of a general and continuing authority, third persons who had been led to rely thereon in good faith could not be affected by the termination unless they had notice of the facts.

§ 190. Termination by subsequent act of parties.—The authority may be terminated by the subsequent act of one or more of the parties, as—

(1) Where it may be terminated by the act of both, *i. e.*, by their mutual consent; or where it may be terminated by the act of one, as—

(2) Where the principal revokes it, or

(3) Where the agent renounces it.

These points may be generally tabulated thus:—

Termination of Agency
- **I. By Act of Parties**
  - **1. By their Original Agreement.**
    - **a. By Accomplishment of Object.**
    - **b. By Expiration of Time.**
    - **c. By Happening of Agreed Event.**
  - **2. By their Subsequent Act.**
    - **a. By Act of Both—Mutual Consent.**
    - **b. By Act of One**
      - **Revocation by Principal.**
      - **Renunciation by Agent.**
- **II. By Operation of Law (Happening of Events)**
  - **Death—of principal or agent.**
  - **Bankruptcy—of principal or agent.**
  - **Insanity—of principal or agent.**
  - **Marriage—of principal.**
  - **War.**
  - **Change of law.**
  - **Loss, destruction or sale of subject-matter.**

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[6] See Ballard v. Ins. Co. (1896), 119 N. Car. 187, 25 S. E. 867; Burelson v. Ins. Co. (1890), 86 Cal. 342, 24 Pac. 1064; Barkley v. Olcutt (1889), 52 Hun (N. Y.) 452, 5 N. Y. Sup. 525, 24 N. Y. St. R. 94.

1. *Termination by Mutual Consent.*

§ 191. Agency may be terminated at any time by mutual consent.—The agency may ordinarily be terminated by mutual consent of the principal and agent at any time. Notwithstanding any limitation or condition originally imposed, the same power that made the arrangement in the first instance can subsequently waive the condition or remove the limitation. So far as any authority depends upon the act of the parties (as distinguished from authority created by law) the law has no purpose to subserve which will require the continuance of the relation, when *both* parties desire and agree that it shall be terminated, and the rights of third parties are not involved.

2. *Revocation by Principal.*

§ 192. Power of principal to revoke—Usually at any time.—In the ordinary case, agency is created to subserve some purpose which the principal has in mind. It is the principal's will that is to be executed, his interest that is to be promoted. The agent usually has no other interest than to carry the principal's purpose into effect and earn the promised compensation. If, therefore, the principal's circumstances are altered, if his purpose change, if his interest will be better served by discontinuing the enterprise than by prosecuting it, he certainly ought to have it in his power to withdraw the authority; and the agent can ordinarily have no interest in the matter which will justify him in insisting upon going on, if his claim to such damages as he may legally have sustained by the termination of the authority be recognized. It is, therefore, the general rule that the principal may revoke the agent's authority at any time before its execution and for any reason deemed sufficient to himself.[7]

This kind of authority which has the principal's interests and purposes only primarily behind it, is sometimes called, to distinguish it from another sort soon to be investigated, a *bare* power, a *naked* power, or a *mere* power, and it is said that the principal may in general revoke such a power at his pleasure at any time.

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[7] See Clark v. Marsiglia (1845), 1 Denio (N. Y.) 317, 43 Am. Dec. 670; State v. Walker (1885), 88 Mo. 279, affirmed 125 U. S. 339, 8 Sup. Ct. 929, 31 L. Ed. 769; Owen v. Frink (1864), 24 Cal. 171, 178; Lord v. Thomas (1876), 64 N. Y. 107; Burke v. Priest (1892), 50 Mo. App. 310, Goddard's Cas. 210; Brookshire v. Voncannon (1845), 28 N. Car. (6 Ired.) 231, Goddard's Cas. 212.

§ 193. —— Not so as to affect acts already done.—Of course, if the authority has been executed, or the agent has entered into a legally binding contract, the authority, though otherwise revocable, cannot be revoked so as to affect these acts already done. If the authority has been executed in part only, and the residue be severable, the authority as to such residue may be revoked as in other cases.

§ 194. —— Not when given by way of security or coupled with an interest.—While revocability is thus the rule in the ordinary case, there may be cases wherein there is something more than a mere authority—cases wherein the agent also has an interest in the continuance and exercise of the authority of such a substantial nature that the law will protect it by enabling him to exercise the authority, notwithstanding acts or events which would ordinarily revoke it.

Although the basis of classification is not entirely clear, and the nomenclature is not satisfactory, the cases fall into two general groups—(1) those in which the authority can not be revoked by the principal's own act, though it may be terminated by his death; and (2) those in which neither the act of the principal nor his death would be sufficient to terminate it.

§ 195. —— These two situations may be illustrated in this way: I wish to borrow money of A; he declines to loan it merely upon my note or other promise to repay it, and demands *security*. I say to him, "if I do not repay you, you may come and take my horse and sell it, and take your pay out of the proceeds," and in consideration thereof and in reliance thereon, he loans me the money. I give him no present estate or property in the horse, but an authority to hereafter take it and apply it to the payment of the debt. This is an authority, but it is an authority given by way of security, and for a valuable consideration.

Or I may now deliver the horse to A, to keep as security, and authorize him as before if the debt is not paid, to sell the horse and reimburse himself out of the proceeds. In this case A has, what he had not in the former case, namely, a present property interest in the horse, as well as an authority over it; he is a pledgee with an express authority to sell; he does not own the horse but he has a property interest in it; his authority to sell is "coupled" with a property interest.

In neither case may I *revoke* the authority without paying the debt, but, in the first case, if I should die before A had acted under the authority by taking possession of the horse, the authority, being merely that, and therefore having to be exercised in my name over my property, would terminate at my death; while in the second A's present property in the horse would not be destroyed by my death, it would survive, and A in his own name could sell the horse to get his interest out.

In the former case, there may be said to be a power or authority given as security;[8] in the latter, a power or authority coupled with a property interest.[9] The former would not be good against a purchaser for value without notice.

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[8] See Hunt v. Rousmanier (1823), 8 Wheat. (21 U. S.) 174, 5 L. Ed. 589, Mechem's Cas. 322, Goddard's Cas. 274, Wambaugh's Cas. 974; Terwilliger v. Ontario, etc., R. Co. (1896), 149 N. Y. 86, 43 N. E. 432, Goddard's Cas. 220; American Loan & Tr. Co. v. Billings (1894), 58 Minn. 187, 59 N. W. 998; Gaussen v. Morton (1830), 10 Barn. & C. 731; State v. Hyde (1918), 88 Oreg. 1, 169 Pac. 757, 171 Pac. 582, Ann. Cas. 1918E, 688.

See also Boyer v. Nesbitt (1910), 227 Pa. 398, 76 Atl. 103, 136 Am. St. R. 890; Mobile, etc., R. Co. v. Nicholas (1892), 98 Ala. 92, 12 So. 723.

This is something like an irrevocable license, as to which, see Lambert v. Robinson (1894), 162 Mass. 34, 37 N. E. 753, 44 Am. St. R. 326; Giles v. Simonds (1860), 81 Mass. (15 Gray) 441, 77 Am. Dec. 373; Sterling v. Warden (1871), 51 N. H. 217, 12 Am. Rep. 80; Emerson v. Shores (1901), 95 Me. 237, 49 Atl. 1051, 85 Am. St. R. 404; Fish v. Capwell (1894), 18 R. I. 667, 29 Atl. 840, 49 Am. St. R. 807, 25 L. R. A. 159; Wood v. Leadbitter (1845), 13 Mees. & Wels. 838.

[9] See Knapp v. Alvord (1843), 10 Paige (N. Y.) 205, 40 Am. Dec. 241, Mechem's Cas. 328, Wambaugh's Cas. 979; Montague v.

§ 196. —— Much the same situation is presented where, in a contract between the parties, it is agreed, in order to secure performance by one party or to prevent loss by non-performance, that one party shall have and is given authority to do some act in reference to the subject-matter as the agent of the other. This is sometimes said to be a case in which "a letter of attorney forms a part of a contract, and is a security for money or for the performance of any act which is deemed valuable." Such an authority could not be revoked by the principal (unless he performed the act it was given to secure),[10] though it would usually be terminated by his death.

§ 197. —— The fact that the agent may have an *interest* in the execution of the authority in order that he may earn his commissions or other promised compensation for the doing of the act, is not enough to render it irrevocable.[11] An action for breach of contract, if there was a contract, is deemed an adequate remedy.

So the fact that the authority was called "irrevocable" or "exclusive" will not prevent its revocation. Its nature and not the name given determines that matter.[12] Such stipulations usually amount to no more than contracts not to revoke, which may nevertheless be broken (since they cannot ordinarily be specifically enforced), subject to a liability for the breach of the contract.

§ 198. Contracts not to revoke an otherwise revocable authority.—The fact that the principal may have expressly agreed that the agency shall continue for a certain period will not pre-

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McCarroll (1897), 15 Utah 318, 49 Pac. 418, Goddard's Cas. 218.

[10] See Carmichael's Case [1896], 2 Ch. Div. 643.

[11] See Taylor v. Burns (1904), 8 Ariz. 463, 76 Pac. 623, Goddard's Cas. 225; Hartley's Appeal (1866), 53 Pa. 212, 91 Am. Dec. 207, Goddard's Cas. 226.

[12] See Blackstone v. Buttermore (1867), 53 Pa. 266, Mechem's Cas. 255, Goddard's Cas. 214, Wambaugh's Cas. 983; McGregor v. Gardner (1862), 14 Iowa 326, Goddard's Cas. 213; Chambers v. Seay (1882), 73 Ala. 373, Mechem's Cas. 252; Walker v. Denison (1877), 86 Ill. 142.

vent his revoking the authority before that time, if it be otherwise revocable; but if he does revoke it he will be liable to the agent for the damages which the agent sustains on account of the revocation contrary to the agreement.[13]

Distinction is sometimes made, in these cases, between the *power* to revoke and the *right* to revoke; the principal always having the power to revoke (since there is ordinarily no legal method of preventing his doing so[14]) but not having the right to do so in those cases wherein he has agreed not to exercise his power during a certain period. If, in the latter case, he does exercise his power he must respond in damages.[15]

The same conclusion is often reached by distinguishing between the *authority* and the *contract of employment*. The authority may be withdrawn at any moment, but the contract of employment can not be terminated in violation of its terms without the principal's becoming liable in damages.[16]

If the employment were at will merely, or not for any definite time, it could, of course, ordinarily be terminated without liability.

§ 199. **How revoke.**—Where the principal has the power to revoke, he may do so ordinarily by any method which clearly manifests his intention to do it. He may do it expressly by spoken or written word. But the revocation need not be express. It may be implied from circumstances, as where the principal disposes of the subject matter of the agency, or appoints another agent to perform the undertaking, or himself intervenes to perform it in person. It will also, in general, result from the dissolution of a partnership or of a corporation which was the principal; and from the severance of the joint interest of joint principals.[17]

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[13] See Standard Oil Co. v. Gilbert (1890), 84 Ga. 714, 11 S. E. 491, 8 L. R. A. 410, Mechem's Cas. 273; Missouri v. Walker (1888), 125 U. S. 339, 8 Sup. Ct. 929, Mechem's Cas. 277; Wilcox & G. Sew. Mach. Co. v. Ewing (1891), 141 U. S. 627, 12 Sup. Ct. 94, 35 L. Ed. 882, Mechem's Cas. 283; Durkee v. Gunn (1889), 41 Kan. 496, 21 Pac. 637, 13 Am. St. R. 300, Mechem's Cas. 312.

[14] See *post* § 203.

[15] See Alworth v. Seymour (1890), 42 Minn. 526 44 N. W. 1030, Mechem's Cas. 314; Blumenthal v. Goodall (1891), 89 Cal. 251, 26 Pac. 906, Goddard's Cas. 240; Parke v. Frank (1888), 75 Cal. 364, 17 Pac. 427, Goddard's Cas. 216.

[16] See Turner v. Sawdon [1901], 2 K. B. 653.

§ 200. Notice of revocation.—1. To third persons.—Upon revoking the authority of a *general* agent, the principal must usually give notice of the revocation to persons who have previously known of or dealt with the agent as such, or he will continue to be bound by the agent's acts. The notice required is similar to that required upon the dissolution of a partnership, namely, actual notice to those who have extended credit in reliance upon the authority, and general public notice by advertisement or otherwise to those who, though they may have known of the agency, had never dealt in reliance upon it before the revocation.[18]

In the case of the so-called *special* agent, there being no habit of dealing established or any appearance of a continuing authority, no notice of revocation is ordinarily necessary, at least unless the agent has been accredited to the particular person who deals with him, or has already begun the execution of the authority.[19] No notice is ordinarily necessary that such an agency has come to an end by its own limitations, *e. g.*, by performance of the act contemplated. Third persons cannot ordinarily be misled in these cases.

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[17] See *post* § 211; Rowe v. Rand (1887), 111 Ind. 206, Mechem's Cas. 257; Ahern v. Baker (1885), 34 Minn. 98, 24 N. W. 341, Mechem's Cas. 288, Goddard's Cas. 274, Wambaugh's Cas. 972; Salton v. Cycle Co. [1900], 1 Ch. Div. 43; Clark v. Mullenix (1858), 11 Ind. 532, Goddard's Cas. 243.

Held, not necessary that revocation of authority under seal should be by an instrument under seal, especially where that seal was not necessary to validity of power: Brookshire v. Brookshire (1847), 30 N. Car. (8 Ired.) 74, 47 Am. Dec. 341, Goddard's Cas. 245, Wambaugh's Cas. 953.

[18] See Clafin v. Lenheim (1876), 66 N. Y. 301, Mechem's Cas. 294; Wheeler v. McGuire (1888), 86 Ala. 398, 5 So. 190, 2 L. R. A. 808, Mechem's Cas. 362; Maxcy Mfg. Co. v. Burnham (1896), 89 Me. 538, 36 Atl. 1003, 56 Am. St. R. 436; Burch v. Grocery Co. (1906), 125 Ga. 153, 53 S. E. 1008, Goddard's Cas. 254; Gragg v. Home Ins. Co. (Ky. 1908.), 32 Ky. L. Repr. 988, 107 S. W. 321.

Compare Jones v. Hodgkins (1872), 61 Me. 480; White v. Century Savings Bank (1916), 144 C. C. A. 665, 229 Fed. 975.

Where a power of attorney has been recorded, the instrument revoking it should be likewise recorded. Gratz v. Improvement Co. (1897), 82 Fed. 381, 53 U. S. App. 499, 27 C. C. A. 305, 40 L. R. A. 393. Statutes frequently provide for this.

But where the principal has sent the agent out, equipped with, or has left in his hands, an apparently continuing, unqualified and unexecuted power of attorney to act for him, third persons relying upon it in good faith, exercising reasonable precaution and without notice of its revocation, should be protected.[20]

§ 201. —— 2. To the agent.—Notice of the revocation must also be given to the agent, and as to him it will ordinarily not be operative until he receives it or it is otherwise brought to his attention.[21] If the agent knew it, but the person with whom he dealt did not, and was a person entitled to notice, the latter may usually hold the principal; if the agent did not know of it but the person with whom he dealt knew it, the latter could ordinarily not hold the principal. If neither the agent nor the person with whom he dealt knew of the revocation, but the agency was a special one or a conditional one requiring no notice, the principal could ordinarily not be held to a third person.[22]

Since the agent may incur liability to third persons, under an implied warranty of authority, it is essential that the principal shall notify the agent of acts or events terminating the authority, known to the principal, but not likely otherwise to be known by the agent, and as to which the agent had not taken the risk.

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[19] See Ahern v. Baker, *supra;* Florida Cent. R. Co. v. Ashmore (1901), 43 Fla. 272, 32 So. 832; Kelly v. Brennan (1897), 55 N. J. Eq. 423, 37 Atl. 137.

[20] See George v. Sandel (1866), 18 La. Ann. 535; Beard v. Kirk (1840), 11 N. H. 397; Williams v. Birbeck (1840), Hoffm. (N. Y.) 359; Morgan v. Stell (1812), 5 Binn. (Pa.) 305.

[21] Where notice of revocation is sent by mail, it will usually be operative from the time of receipt, not on mailing: Robertson v. Cloud (1872), 47 Miss. 208, Wambaugh's Cas. 955. See also Sayre v. Wilson (1888), 86 Ala. 151, 5 So. 157; Salton v. Cycle Co. [1900], 1 Ch. Div. 43.

Effective on delivery at proper place, though he was not there to receive it: Rees v. Pellow (1899), 38 C. C. A. 94, 97 Fed. 167.

[22] See Ahern v. Baker, *supra.*

3. *Renunciation by Agent.*

§ 202. **Power of agent to renounce authority.**—The agent also has it in his power to renounce his authority at any time, but if he does so in violation of an agreement to act for a particular time, or if he fails to give reasonable notice, he will be liable to the principal for the damages sustained.[23]

§ 203. **Enforcement of contract of agency.**—Courts of equity will not ordinarily undertake to enforce specific performance by the agent of a contract of agency, nor will they interfere to prevent by injunction a violation of the contract, except in cases involving services of such a peculiar and personal character that damages would be inadequate compensation.[24]

§ 204. **Agency at will.**—Where no period is fixed for the continuance of the agency, and no stipulation is made respecting its termination, it is presumed to be at will, and either party may terminate it without liability at any time by giving reasonable notice.[25]

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[23] See Security Ins. Co. v. Ellsworth (1906), 129 Wis. 349, 109 N. W. 125, Goddard's Cas. 263; Cannon Coal Co. v. Taggart (1891), 1 Colo. App. 60, 27 Pac. 238, Goddard's Cas. 265

[24] See Alworth v. Seymour (1890), 42 Minn. 526, 44 N. W. 1030, Mechem's Cas. 314; Cort v. Lassard (1889), 18 Oreg. 221, 22 Pac. 1054, 17 Am. St. R. 726, 6 L. R. A. 653, Mechem's Cas. 316; Rogers Mfg. Co. v. Rogers (1890), 58 Conn. 356, 20 Atl. 467, 18 Am. St. R. 278, 7 L. R. A. 779, Goddard's Cas. 267; Mair v. Himalaya Tea Co. (1865), L. R. 1 Eq. 411, Goddard's Cas. 238; Harlow v. Oregonian Pub. Co. (1904), 45 Oreg. 520, 78 Pac. 737, Goddard's Cas. 269.

[25] See Sheahan v. Steamship Co. (1898), 87 Fed. 167, 30 C. C. A. 593, Goddard's Cas. 227; Rees v. Pellow (1899), 97 Fed. 167, 38 C. C. A. 94; Hoover v. Windmill Co. (1889), 41 Minn. 143, 42 N W. 866, Goddard's Cas. 227; Jacobs v. Warfield (1871), 23 La. Ann. 395, Mechem's Cas. 287.

But contracts for a definite time may in some cases be implied from circumstances fairly justifying that conclusion, even though no express understanding to that effect was had.[26] Such agreements, however, are not lightly to be inferred, especially where their obligations would not be mutual.[27]

The same rules apply where the relation is that of master and servant, rather than that of agency.

§ 205. **Discharge of agent justified when.**—And even though employed for a definite time, the agent or servant may lawfully be discharged, if he proves incompetent for the task assumed, or if he is guilty of disloyalty or of wilful disobedience to lawful orders, or of such disorderly, dishonest, or immoral conduct as amounts to a breach of his implied undertaking to conduct himself with fidelity and propriety.[28]

§ 206. **Renunciation by agent justified when.**—The agent or servant may also lawfully terminate the relation, though entered into for a definite term, if he is required to do dishonest or unlawful acts, or to take unassumed risks, or to perform service other than that which he undertook to render. The cruel, oppressive or immoral conduct of the principal or master may also justify it.

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[26] See Rhodes v. Forwood (1876), L. R. 1 App. Cas. 256, Mechem's Cas. 259; Turner v. Goldsmith [1891], 1 Q. B. Div. 544, Mechem's Cas. 266; Lewis v. Insurance Co. (1876), 61 Mo. 534, Mechem's Cas. 269; Glover v. Henderson (1894), 120 Mo. 367, 25 S. W. 175, 41 Am. St. R. 695, Goddard's Cas. 229; Stier v. Insurance Co. (1893), 58 Fed. 843, Goddard's Cas. 233; Warren Chemical Co. v. Holbrook (1890), 118 N. Y. 586, 23 N. E. 908, 16 Am. St. R. 788.

[27] See Stier v. Insurance Co., *supra.*

[28] See Dieringer v. Meyer (1887), 42 Wis. 311, 24 Am. Rep. 415, Mechem's Cas. 289; Bass Furnace Co. v. Glasscock (1886), 82 Ala. 452, 2 So. 315, 60 Am. Rep. 748, Mechem's Cas. 291; Atkin v. Acton (1830), 4 Car. & P. 208, Goddard's Cas. 237; Gould v. Metal Co. (1904), 207 Ill. 172, 69 N. E. 896; Thompson v. Havelock (1808), 1 Camp. 527, Wambaugh's Cas. 907; Kreuger v. Knitting Co. (1918), 209 Ill. App. 96; Fuqua v. Massie (1894), 95 Ky. 387, 25 S. W. 875; Brightson v. Claflin Co. (1904), 180 N. Y. 76, 72 N. E. 920 (discussed but not decided); Wade v. Barr Dry Goods Co. (1910), 155 Mo. App. 405, 134 S. W. 1084; Ulrich v. Hower (1893), 156 Pa. 414, 27 Atl. 243.

II. Termination by Operation of Law.

§ 207. In general.—The authority may also be terminated in many cases by what is termed the operation of law, that is, upon the happening of some event which makes the further continuance of the agency incompatible, impracticable or impossible. The most important of these events are:—

§ 208. Death of principal.—The death of the principal which, of course, renders impossible any further transactions in his name and on his account, as well as introduces new owners,—his heirs or distributees—for the estate and interests formerly his, ordinarily operates to instantly terminate an authority, not coupled with an interest.[29] "The interest which can protect a power after the death of the person by whom it was created must be an interest in the thing itself. The power must be ingrafted upon some estate or interest in the thing to which it relates." A mere interest in commissions or profits to result from the execution of the power is not enough;[30] nor is it enough that the power was given as security merely, as explained in a preceding section.[31]

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[29] See Hunt v. Rousmanier (1823), 8 Wheat. (21 U. S.) 174, 5 L. Ed. 589, Mechem's Cas. 322, Goddard's Cas. 274, Wambaugh's Cas. 974; Knapp v. Alvord (1843), 10 Paige (N. Y.) 205, 40 Am. Dec. 241, Mechem's Cas, 328, Wambaugh's Cas. 979; Farmers' Loan & Trust Co. v. Wilson (1893), 139 N. Y. 284, 34 N. E. 784, 36 Am. St. R. 696; Pacific Bank v. Hannah (1898), 90 Fed. 72, 59 U. S. App. 457, 32 C. C. A. 522; Gardner v. First Nat. Bank (1890), 10 Mont. 149, 25 Pac. 29, 10 L. R. A. 45; Streit v. Wilkerson (1914), 186 Ala. 88, 65 So. 164, Ann. Cas. 1917E, 378, with extended Note.

Compare Glennan v. Trust Co. (1913), 209 N. Y. 12, 102 N. E. 537, Ann. Cas. 1915A, 441.

[30] See Gardner v. First Nat. Bank, *supra;* Weaver v. Richards (1906), 144 Mich. 395, 108 N. W. 382, 6 L. R. A. (N. S.) 855.

[31] See *ante* § 195; Hunt v. Rousmanier, *supra;* Fisher v. Trust Co. (1905), 138 N. Car. 90, 50 S. E. 592.

Stipulations in the instrument that death shall not revoke it, are, if it is otherwise revocable, usually unavailing.[32]

§ 209. —— Death unknown.—By the weight of authority the rule applies even though the fact of the death may not be known to the agent or to the third person with whom he deals; though the harshness of this rule has caused it in some cases to be changed by statute, and some courts deny it so far as it would operate to defeat interests acquired in ignorance of the death.[33]

§ 210. —— Contracts of employment.—Most contracts for personal service so clearly involve the continued existence of the parties to them that the death of the principal or master (or of the servant, as will be seen in a later section) automatically, and without liability in damages, terminates the employment.[34] But, on the other hand, contracts for work which does not depend upon the direction and control or personal qualities or situation of the employer,—which can be performed by and for his representatives or successors in interest as well, are often held not to be terminated by his death.[35]

§ 211. —— Death of joint principal or partner.—The death of a partner, or of one of two or more joint principals, will usually terminate an authority not coupled with an interest.[36] Whether the death of a partner will terminate a contract of employment has been both affirmed[37] and denied,[38] especially where the business goes on substantially unaltered.[39]

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[32] See Weaver v. Richards, *supra.*

[33] See Weber v. Bridgman (1889), 113 N. Y. 600, 21 N. E. 985, Mechem's Cas. 331; Davis v. Windsor Savings Bank (1874), 46 Vt. 728, Goddard's Cas. 278. *Contra:*—See Cassiday v. McKenzie (1842), 4 Watts & Serg. (Pa.) 282, 39 Am. Dec. 76; Ish v. Crane (1858), 8 Ohio St. 520, 13 id. 574; Dick v. Page (1852), 17 Mo. 234, 57 Am. Dec. 267; Deweese v. Muff (1898), 57 Neb. 17, 77 N. W. 361, 73 Am. St. R. 488, 42 L. R. A. 789, Goddard's Cas. 279.

[34] See Lacy v. Getman (1890), 119 N. Y. 109, 23 N. E. 452, 16 Am. St. R. 806, 6 L. R. A. 728; Yerrington v. Greene (1863), 7 R. I. 589, 84 Am. Dec. 578; Marvel v. Phillips (1894), 162 Mass. 399, 38 N. E. 1117, 44 Am. St. R. 370, 26 L. R. A. 416.

[35] See Dumont v. Heighton (1912), 14 Ariz. 25, 123 Pac. 306, 39 L. R. A. (N. S.) 1187; Grapel v. Hodges (1889), 112 N. Y. 419, 20 N. E. 542.

§ 212. Death of agent.—Termination of the authority must also ordinarily ensue from the death of the agent,[40] except in those cases in which the agent had an authority given as security or coupled with an interest, which may be exercised by his representatives.[41]

Contracts of employment for personal service would also usually be terminated, without liability to damages, for the same reasons which cause termination upon the death of the principal.

A joint authority, demanding joint execution, would likewise usually be ended by the death of one of the joint agents.[42]

§ 213. Insanity of principal or agent.—The insanity of the principal must also ordinarily operate to terminate or at least suspend, an authority not given as security or coupled with an interest;[43] saving, usually, the rights of third persons who, in ignorance of the insanity, have parted with things of value to which they can not be restored and from which the insane person or his estate has profited.[44] And where the principal, before his insanity, has accredited the agent to a particular person as his regular agent, such person will, it has been held, be protected in continuing in good faith to rely upon the agency until he has notice of the insanity.[45] An adjudication of insanity while usually conclusive is not the only sufficient evidence of the fact.

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[36] See Schlater v. Winpenny (1874), 75 Pa. 321.

[37] See Griggs v. Swift (1889), 82 Ga. 392, 9 S. E. 1062, 14 Am. St. R. 176, 5 L. R. A. 405, Mechem's Cas. 537.

[38] See Fereira v. Sayre (1843), 5 Watts & S. (Pa.) 210, 40 Am. Dec. 496.

[39] See Hughes v. Gross (1896), 166 Mass. 61, 43 N. E. 1031, 55 Am. St. R. 375, 32 L. R. A. 620.

[40] See Love v. Peel (1906), 79 Ark. 366, 95 S. W. 998; Adriance v. Rutherford (1885), 57 Mich. 170, 23 N. W. 718; Tyson v. Coal & Iron Co. (1911), 115 Md. 564, 81 Atl. 41.

[41] See Lewis v. Wells (1874), 50 Ala. 198; Merrin v. Lewis (1878), 90 Ill. 505; Collins v. Hopkins (1859), 7 Iowa 463; Harnickell v. Orndorff (1871), 35 Md. 341.

[42] See Hartford F. Ins. Co. v. Wilcox (1870), 57 Ill. 180; Martine v. International L. Ins. Co. (1873), 53 N. Y. 339, 13 Am. Rep. 529.

[43] See Matthiessen, etc., Co. v. McMahon (1876), 38 N. J. L. 536, Mechem's Cas. 335; Davis v. Lane (1839), 10 N. H. 156, Goddard's Cas. 282; Yonge v Toynbee, [1910] 1 K. B. 215.

The insanity of the agent must also ordinarily terminate or at least suspend an authority not coupled with an interest, subject to substantially the same qualifications as those stated above.

§ 214. Bankruptcy of principal or agent.—The bankruptcy —not the mere insolvency—of the principal will also ordinarily terminate an authority to act in any business involved in the bankruptcy, and not given as security or coupled with an interest.[46] The bankruptcy of a business agent would ordinarily have the same effect.[47]

§ 215. Marriage of principal.—The marriage of a woman at common law would revoke a power of attorney previously given by her, but this result would not ensue under many of the modern statutes. But in any event the marriage of the principal will terminate an authority, not coupled with an interest, where the execution of the authority would operate to defeat rights acquired by the marriage by the husband or wife of the principal, in the property which was the subject-matter of the authority.[48]

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[44] See Molton v. Camroux (1848), 2 Exch. 487, 4 id. 17; Mutual L. Ins. Co. v. Hunt (1880), 79 N. Y. 541.

[45] See Drew v. Nunn (1879), 4 Q. B. Div. 661, Wambaugh's Cas. 967. Here the agent—the wife—could *not* be held.

Compare Yonge v. Toynbee, *supra*. Here the agent was held.

[46] See Renshaw v. Creditors (1888), 40 La. Ann. 37, 3 So. 403; Dickinson v. Central Nat. Bank (1880), 129 Mass. 279, 37 Am. Rep. 351; Hall v. Bliss (1875), 118 Mass. 554, 19 Am. Rep. 476; Warwick v. Hardingham (1880), 15 Ch. Div. 339.

Mere appointment of a receiver for a railroad does not terminate authority of its agents: Missouri, etc., R. Co. v. Hudson (1918), — Okla. —, 175 Pac. 743, 9 A. L. R. 223, and Note. *Contra:* Chilette v. Railroad Co. (1918), 102 Kan. 297, 171 Pac. 14, L. R. A. 1918C, 1147. Other cases are cited in these.

[47] See Audenried v. Betteley (1864), 90 Mass. (8 Allen) 302; Hudson v. Granger (1821), 5 B & Ald. 27.

§ 216. **War.**—War between the country of the principal and that of the agent will suspend, if not abrogate, many kinds of authority. The sending of instructions, the making of reports, the remittance of money, etc., across the lines will usually in fact become impossible. "Trading with the Enemy Acts," and similar statutes will forbid many kinds of dealing. On the other hand some kinds of acts previously authorized which may be done within the country in which the agent is, or in neutral countries, and which the principal would presumptively still desire to have done, like the protection of his property there, the collection of debts, the sale of property there situated, and the like, are generally held to be permissible.[49]

§ 217. **Change in law.**—A change in the law by which the further prosecution of the agency, or the rendition of the service as contemplated, becomes unlawful, will ordinarily operate to terminate an authority to act or a contract of service.[50]

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[48] See Henderson v. Ford (1877), 46 Tex. 627; Wambole v. Foote (1878), 2 Dak. 1, 2 N. W. 239; Eneu v. Clark (1845), 2 Pa. St. 234, 44 Am. Dec. 191.

[49] See Insurance Co. v. Davis (1877), 95 U. S. 425, 24 L. Ed. 453, Mechem's Cas. 336, Wambaugh's Cas. 962; Williams v. Paine (1898), 169 U. S. 55, 18 Sup. Ct. 279, 42 L. Ed. 658; Sands v. Ins. Co. (1872), 50 N. Y. 626, 10 Am. Rep. 535; Tingley v. Müller [1917], 2 Ch. 144, 8 Br. Rul. Cas. 681; Stevenson v. Aktiengesellschaft, [1917] 1 K. B. 842, 7 Br. Rul. Cas. 600; Small v. Lumpkin (1877), 28 Gratt. (Va.) 832; Darling v. Lewis (1872), 11 Heisk. (Tenn.) 125; Insurance Co. v. Clopton (1870), 7 Bush (Ky.) 179, 3 Am. Rep. 290; Hubbard v. Matthews (1873), 54 N. Y. 43, 13 Am. Rep. 562.

[50] See Justice v. Lairy (1898), 19 Ind. App. 272, 49 N. E. 459, 65 Am. St. R. 405; American Merc. Exchange v. Blunt (1906), 102 Me. 128, 66 Atl. 212, 120 Am. St. R. 463, 10 L. R. A. (N. S.) 414; Hooper v. Mueller (1909), 158 Mich. 595, 124 N. W. 24, 133 Am. St. R. 399.

§ 218. Destruction, loss or sale of subject-matter.—The destruction of the subject matter of the agency, or of the principal's interest therein, must usually terminate the agency.[51]

So, as has been seen, a special authority to sell a particular piece of property is usually held to be terminated by the sale of that property by the principal himself or by some other agent, where there are no estopping circumstances.[52]

§ 219. Termination of power over subject-matter—Sub-agents.—And finally as the termination of the principal's power over the subject-matter must operate to terminate any authority derived from him, so for the like reasons, the termination of the authority of the agent must also operate ordinarily to terminate the authority of any sub-agents appointed by him, and who are to be regarded merely as his agents.

§ 220. Notice of termination by operation of law.—It is generally said that it is not necessary to give notice of the termination of authority by operation of law.[53] As to certain of the events which are usually and naturally attended by publicity, like war, death, bankruptcy, judicial determination of insanity, change in law, and the like, there can not be much question; as to others there may be more room for doubt. Notice should certainly be given to the agent, at least, in all cases in which the revocation depends upon the act of the principal, or upon events which are peculiarly within his knowledge, and not likely to be known to the agent, and as to which he cannot be deemed to have assumed the risk.

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[51] See Foster v. Bookwalter (1897), 152 N. Y. 166, 46 N. E. 299; Cox v. Bowling (1893), 54 Mo. App. 289.

[52] See Ahern v. Baker (1885), 34 Minn. 341, 24 N. W. 341, Mechem's Cas. 288, Goddard's Cas. 274, Wambaugh's Cas. 972; Kelly v. Brennan (1897), 55 N. J. Eq. 423, 37 Atl. 137, Goddard's Cas. 247.

[53] See Eustis v. Bolles (1888), 146 Mass. 413, 16 N. E. 286, 4 Am. St. R. 327 (partnership); Little v. Hazlett (1901), 197 Pa. 591, 47 Atl. 855; Ahern v. Baker, *supra;* Atkins v. Lewis (1897), 168 Mass. 534, 47 N. E. 507.

CHAPTER IX.

OF THE NATURE AND EXTENT OF THE AUTHORITY.

§221. Distinctions.

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V. ELEMENTS OF AUTHORITY.
- 246. Extent of authority in a particular case.
- 247. Diagram illustrating.

§ 221. Distinctions.—It has been seen in preceding sections that the authority of the agent may be conferred expressly, but that it may also be and perhaps more frequently is left to be inferred from the words and conduct of the principal. While the authority may thus be conferred in either way, some important consequences depend upon whether one method or the other was adopted. If the authority is express, we shall naturally expect to find that its extent, and the time, place and conditions of its exercise, will be fully set forth and clearly defined; and if that be the case both the agent and third persons will have little occasion for uncertainty or doubt as to its extent. If, on the other hand, the authority is to be implied, the questions whether any authority is properly to be implied, and, if so, what kind and how much, must necessarily be matters upon which opinions may differ and which must often remain undetermined until some competent authority has passed upon them.

It has been seen also that authority whether express or implied may be of a general character, or it may be confined within narrow and particular limits. As it is the one or the other, important consequences may or may not attach.

These distinctions, then, are to be kept in mind: As respects the manner of conferring it, the authority may be either express or implied. As respects its extent, it may be either general or special.

I. Express or Implied Authority.

§ 222. **Express authority.**—Where the authority is express, it is, as has been stated, natural to expect that its extent and the conditions of its exercise will be clearly defined. To the degree to which this is true, the limits fixed will be conclusive upon all persons charged with notice of them. No other main authority can be deemed to be conferred than that expressly mentioned. Persons dealing with an agent known to be acting under such an express authority, are bound to take notice of its limitations.[1] So where they are dealing with reference to a matter concerning which the law *requires* written authority or authority under seal, they are bound to take notice of that fact, and will be charged with restrictions contained in the instrument conferring such authority, though they may have had no actual knowledge of them.[2]

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[1] See Stainback v. Read (1854), 11 Gratt. (Va.) 281, 62 Am. Dec. 648; The Floyd Acceptances (1868), 7 Wall. (74 U. S.) 666, 19 L. Ed. 169, 7 Ct. Cl. 65; Whiteside v. United States (1876), 93 U. S. 247, 23 L. Ed. 882, 12 Ct. Cl. 10; Lewis v. Commissioners (1873), 12 Kan. 186.

Where an agent purports to act or sign "per power of attorney," or equivalent terms, the other party is thereby charged with notice of its contents: Mt. Morris Bank v. Gorham (1897), 169 Mass. 519, 48 N. E. 341; Alexander v. Mackenzie (1848), 6 Com. B. 766; Attwood v. Munnings (1827), 7 B. & C. 278, Wambaugh's Cas. 286. But compare Smith v. McGuire (1858), 3 H. & N. 554, Wambaugh's Cas. 324.

Moreover, where the authority is conferred by a formal written instrument the usual presumption will prevail, namely, that the writing includes all of the authority then intended to be conferred, and it can not be enlarged by parol evidence of prior or contemporaneous proposals of a wider authority.[3]

§ 223. **Implied authority.**—As has been seen in earlier sections, authority may often be *implied,* that is to say, be deemed to be included, involved, or implicated within the express authority, or it may be *inferred,* that is to say, be deduced, derived or concluded from the words or conduct of the principal or from the circumstances of the case. Authority, however, which is so inferred cannot exceed the natural and legitimate effects of the facts from which it is inferred, and where it is inferred from the recognition or adoption of acts of a certain sort, its scope must be confined to the performance of similar acts under similar circumstances.[4] It must, moreover, be inferred from facts for which the principal is responsible, and can not arise from mere presumption or from the mere propriety or convenience of its existence.[5]

An implied or inferred authority, in this sense, is a real or actual authority, and not merely an apparent one.

§ 224. —— **By whom inferences drawn.**—The question of what inferences may properly be drawn in these cases is usually one of fact. Where the facts are not disputed and only one inference may properly be drawn from them, the court may decide it; but if the facts are disputed, or if, though not disputed, more than one inference may properly be drawn from them, the question is usually for the jury.

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[2] See Miller v. Wehrman (1908), 81 Neb. 388, 115 N. W. 1078.

[3] See Reese v. Medlock (1863), 27 Tex. 120, 84 Am. Dec. 611, Goddard's Cas. 341; Claflin v. Continental Works (1890), 85 Ga. 27, 11 S. E. 721, Goddard's Cas. 337.

[4] See Graves v. Horton (1887), 38 Minn. 66, 35 N. W. 568, Mechem's Cas. 82; Bickford v. Menier (1887), 107 N. Y. 490, 14 N. E. 438, Mechem's Cas. 93.

[5] See Law v. Stokes (1867), 32 N. J. L. 249, 90 Am. Dec. 655; Edwards v. Dooley (1890), 120 N. Y. 540, 24 N. E. 827; Martinson v. Kershner (1915), 32 N. Dak. 46, 155 N. W. 37; Burchard v. Hull (1898), 71 Minn. 430, 74 N. W. 163, Goddard's Cas. 286.

II. General or Special Authority.

§ 225. **General authority.**—Distinction has been made, in earlier sections, between the general and the special agent, and a similar distinction is made in the character of the authority conferred. The authority is general where the principal has, either expressly or impliedly, held the agent out as authorized to act generally in relation to some subject or class of subjects, *i. e.*, without specific limitations.[6]

§ 226. **Special authority.**—The authority is special where the principal has expressly or impliedly held the agent out as authorized to act only in a particular manner, or in accordance with specific instructions.[7]

§ 227. **Appearance given to authority by principal controls.**—In every case, persons dealing with the agent as such, are bound to ascertain the extent of his authority; but, whether the agency be general or special, the principal will be bound to third persons by the authority as he has caused it to appear. He is not bound by appearances which the agent alone has given to the authority, without the principal's express or implied consent.[8]

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[6] See Butler v. Maples (1869), 9 Wall. (76 U. S.) 766, 19 L. Ed. 822, Mechem's Cas. 340; Hatch v. em's Cas. 345, Wambaugh's Cas. 291; Whitehead v. Tuckett (1812), 15 East 400, Wambaugh's Cas. 277; Pacific Biscuit Co. v. Dugger (1901), 40 Oreg. 362, 67 Pac. 32, Goddard's Cas. 342; Sorrel v. Brewster (1850), 1 Mich. 373, Goddard's Cas. 344; McAlpin v. Cassidy (1856), 17 Tex. 449, Goddard's Cas. 347.

[7] See Butler v. Maples, *supra;* Hatch v. Taylor, *supra;* Bryant v. Moore (1846), 26 Me. 84, 45 Am. Dec. 96, Mechem's Cas. 355; Batty v. Carswell (1806), 2 Johns. (N. Y.) 48, Goddard's Cas. 348, Wambaugh's Cas. 266; Young v. Harbor Point Ass'n (1901), 99 Ill. App. 290, Goddard's Cas. 350.

§ 228. Distinction between authority and instructions.—It is essential to keep in mind that authority and the instructions of the principal are not necessarily identical. There may, of course, be cases wherein the instructions constitute the authority—where they are contemporaneous and coextensive with its creation. But this is not necessarily or even ordinarily true. The principal may first *authorize* the agent to act, and then *instruct* him as to how he shall act. He may authorize an agent to buy wheat in a public market, and then daily or perhaps hourly advise or instruct him as to the amounts which he shall buy, or the prices which he shall pay. He may appoint an agent to make a contract, or a plenipotentiary to negotiate a treaty, and, while holding the representative out as having full authority, may be constantly in communication with him as to the matters to which he may agree. As to the third persons who deal with the agent in such a case, there must be safety in dealing, even though the agent does not obey or respect the instructions, if those persons are acting in good faith and in ignorance of the instructions.[9]

Instructions, moreover, are often intended to be secret. To disclose them would not infrequently defeat their purpose. However proper they may be, therefore, as between the principal and the agent, in determining their relations, they cannot be expected to affect third persons who are ignorant of them.[10]

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[8] See Mechanics Bank v. N. Y., etc., Railroad Co. (1856), 13 N. Y. 599, 11 N. Y. Sup. Ct. 570; Wierman v. Bay City Sugar Co. (1905), 142 Mich. 422, 106 N. W. 75; Dispatch Printing Co. v. National Bank (1911), 115 Minn. 157, 132 N. W. 2; Law v. Stokes (1867), 32 N. J. L. 249, 90 Am. Dec. 655; Walsh v. Hartford F. Ins. Co. (1878), 73 N. Y. 5; Kingsley v. Fitts (1879), 51 Vt. 414; Hanover Nat. Bank v. American, etc., Co. (1896), 148 N. Y. 612, 43 N. E. 72, 51 Am. St. Rep. 721; Wheeler v. McGuire (1888), 86 Ala. 398, 5 So. 190, 2 L. R. A. 808, Mechem's Cas. 362; Figueira v. Lerner (1900), 52 N. Y. App. Div. 216, 65 N. Y. Supp. 293, Goddard's Cas. 332.

[9] See Hatch v. Taylor, *supra;* Bryant v. Moore, *supra;* Wheeler v. McGuire, *supra;* Griggs v. Selden (1886), 58 Vt. 561, 6 Atl. 504, Goddard's Cas. 300; Haubelt v. Rea (1898), 77 Mo. App. 672, Goddard's Cas. 301.

§ 229. Distinction between power and authority.—Although the two terms are frequently used synonymously, distinction must often be made between authority and power. Thus an agent may have it in his power to subject his principal to liability though he was never really authorized to do so by the principal. The distinction already referred to between authority and instructions leads to the same result.

In the case of the servant, this distinction is very marked. The servant frequently has it in his power to subject his master to liabilities which he was never authorized to incur.

§ 230. Extent of general authority.—Where authority has been conferred to act generally in reference to a subject or class of subjects, third persons, who have no notice to the contrary, have the right to presume that the agent has authority to act in the regular and ordinary way, and to do whatever is usual and proper in such cases; and their rights can not be affected by the fact that the principal had given the agent secret instructions which would limit this usual authority.[11]

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[10] See Hatch v. Taylor, *supra;* Bryant v. Moore, *supra;* Brown v. Ins. Co. (1896), 165 Mass. 565, 43 N. E. 512, 52 Am. St. R. 534; Armour v. Ross (1900), 110 Ga. 403, 35 S. E. 787; Harrington v. Bronson (1894), 161 Pa. 296, 29 Atl. 30; Ludlow Wire Co v. Fribley (1903) 67 Kan. 710, 74 Pac. 237, Goddard's Cas. 303.

[11] See Bryant v. Moore (1846), 26 Me. 84, 45 Am. Dec. 96, Mechem's Cas. 355; Towle v. Leavitt (1851), 23 N. H. 360, 55 Am. Dec. 195, Mechem's Cas. 358; Wheeler v. McGuire (1888), 86 Ala. 398, 5 So. 190, 2 L. R. A. 808, Mechem's Cas. 362; Hubbard v. Tenbrook (1889), 124 Pa. 291, 16 Atl. 817, 10 Am. St. Rep. 585, 2 L. R. A. 823, Mechem's Cas. 367; Watteau v. Fenwick, [1893] 1 Q. B. Div. 346, Mechem's Cas. 369, Wambaugh's Cas. 654; Austrian v. Springer (1892), 94 Mich. 343, 54 N. W. 50, 34 Am. St. R. 350; Wilson v. Commercial Union Assur. Co. (1897), 51 S. Car. 540, 29 S. E. 245, 64 Am. St. R. 700; Ruggles v. Am. Central Ins. Co. (1889), 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. R. 674.

§ 231. —— **Known limitations.**—What has thus been said about secret instructions can, of course, have no application to known limitations. "No principle is better settled in law, nor is there any founded on more obvious justice, than that if a person dealing with an agent knows that he is acting under a circumscribed and limited authority, and that his act is outside of and transcends the authority conferred, the principal is not bound; and it is immaterial whether the agent is a general or a special one, because a principal may limit the authority of the one as well as that of the other."[12]

§ 232. **Extent of special authority.**—Where the authority is special, the agent's authority may, in general, be as limited as the principal sees fit to make it, and these limitations will be effective as to any one charged with notice of them,[13] unless the principal has, by conduct or otherwise, held the agent out as having an authority greater than that actually conferred.[14]

§ 233. —— **Incidental authority.**—In either case, however, it is to be remembered that every delegation of authority, whether it be general or special, carries with it, by implication, unless the contrary is expressed, incidental authority to do all those things which are reasonably necessary and proper to carry into effect the main authority granted. This implied authority can not, as to third persons, be cut off by secret limitations.[15]

§ 234. **Custom and usage.**—In either case, also, the range of the authority may be affected by custom or usage.[16] These may range from (1) the general customs of the people, down through (2) the general customs of trade, (3) the general usages of a particular trade, (4) the special or local usages of a particular trade, to (5) the special usages of the particular parties or the particular dealing. The courts will ordinarily take judicial notice, *i. e.*, will not require formal proof, of the general customs of the people and of trade or commerce,[17] but even the general usages of particular trades, and certainly the special or local usages referred to, must ordinarily be proved as facts,[18] and the parties must be shown to have dealt with such usages presumptively in view.[19]

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[12] See Quinlan v. Providence Ins. Co. (1892), 133 N. Y. 356, 31 N. E. 31, 28 Am. St. R. 645; Hutson v. Prudential Ins. Co. (1905), 122 Ga. 847, 50 S. E. 1000, Goddard's Cas. 304.

[13] See *post* § 238, *et seq.*

[14] See Cleveland v. Pearl (1890), 63 Vt. 127, 21 Atl. 261, 25 Am. St. Rep. 748, Mechem's Cas. 556; Bryant v. Moore, *supra;* Towle v. Leavitt, *supra;* Wheeler v. McGuire, *supra;* Dyer v. Duffy (1894), 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339.

[15] See Wheeler v. McGuire, *supra;* Austrian v. Springer (1892), 94 Mich. 343, 54 N. W. 50, 34 Am. St. R. 350; Grand Rapids Electric Co. v. Walsh Mfg. Co. (1905), 142 Mich. 4, 105 N. W. 1, Goddard's Cas. 295.

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[16] In Cawthorn v. Lusk (1892), 97 Ala. 674, 11 So. 731, Goddard's Cas. 310 it is said: "The law presumes that when a commercial agency is to be exercised, in the absence of limitation or prohibition, it is to be conducted in the mode authorized and justified by the customs and usages or such trade or business."

In Guesnard v. Louisville, etc., R. Co. (1884), 76 Ala. 453, it is said: "Where a mercantile agency is to be executed at a particular place, the principal who employs the agent is presumed to consent that he may execute it, in the absence of particular instructions, according to the general custom and usage relating to that kind of trade or business, whatever it may be."

In Keith v. Herschberg Optical Co. (1886), 48 Ark. 138, 2 S. W. 777, Goddard's Cas. 326, the court approves the following statement: "The general rule is, as to all contracts including sales, that the agent is authorized to do whatever is usual to carry out the object of his agency, and it is a question for the jury to determine what is usual."

[17] In Ahern v. Goodspeed (1878), 72 N. Y. 108, the court said: "It is within our judicial observation, from many cases before us," that a certain sort of sale was usually accompanied by a warranty, and that agents to make such a sale therefore had authority to make it.

See also Talmage v. Bierhause (1885), 103 Ind. 270, 2 N. E. 716; Murray v. Brooks (1875), 41 Iowa 45; McCormick v. Kelly (1881), 28 Minn. 135, 9 N. W. 675.

[18] See Cleveland, etc., R. Co. v. Jenkins (1898), 174 Ill. 398, 51 N. E. 811, 66 Am. St. R. 296, 62 L. R. A. 922; Foye v. Leighton (1850), 22 N. H. 71, 53 Am. Dec. 231.

[19] One who authorizes an agent to deal in a market at which, or with regard to a matter respecting which, it is reasonable to expect that established usages prevail, will ordinarily be presumed to have dealt with them in view,

Usages not shown to have been specially assented to, will not be permitted to overthrow positive rules of law, as, for example, that the agent may not deal for or with himself or represent adverse interests, without his principal's consent;[20] or to contradict an express contract to the contrary;[21] or, as between principal and the agent, or a third person having knowledge, be permitted to contravene specific instructions.[22] On the other hand, where the parties were apparently dealing in view of established usages, the other party cannot be affected by the principal's secret instructions to his agent not to observe them.

In any case, of course, the act done must be one which the usage justifies and not an excessive or unusual one.

III. Actual and Apparent Authority.

§ 235. What meant by this distinction.—As has been seen,[23] a distinction is frequently made between an actual and an apparent or ostensible authority. Although such a distinction is common, the basis for it is not altogether agreed upon. The California code declares that "An agency is actual when the agent is really employed by the principal. An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him."[24]

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unless he gives notice to the contrary. See Pennsylvania R. Co. v. Naive (1903), 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443; Skiff v. Stoddard (1893), 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102; Samuels v. Oliver (1889), 130 Ill. 73, 22 N. E. 499.

[20] See Robinson v. Mollett (1872), L. R. 7 H. L. 802; Gates Iron Works v. Denver Engine Works (1901), 17 Colo. App. 15, 67 Pac. 173, Goddard's Cas. 313; Farsworth v. Hemmer (1861), 1 Allen (83 Mass.) 494, 79 Am. Dec. 756, Goddard's Cas. 316.

[21] See Brown v. Foster (1873), 113 Mass. 136, 18 Am. Rep. 463; Randall v. Smith (1873), 63 Me. 105, 18 Am. Rep. 200; Rogers v. Woodruff (1873), 23 Ohio St. 632, 13 Am. Rep. 276.

[22] See Hall v. Storrs (1858), 7 Wis. 253; Hutchings v. Ladd (1868), 16 Mich. 493; Day v. Holmes (1869), 103 Mass. 306; Parsons v. Martin (1858), 11 Gray (77 Mass.) 111; Barksdale v. Brown (1815), 1 Nott & McC. (S. Car.) 517, 9 Am. Dec. 720, Goddard's Cas. 317.

[23] *Ante*, § 25.

[24] Adopted also in North Dako-

The Supreme Court of Minnesota[25] has declared that "Implied authority is that which the principal intends his agent to possess, and which is proper, usual and necessary to the exercise of the authority actually granted. It includes all such 'acts and things as are directly connected with and essential to the business in hand.' Apparent authority is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which he holds him out as possessing. Agency or authority by estoppel arises in those cases where the principal by his culpable negligence permits his agent to exercise powers not granted to him, even though the principal have no notice or knowledge of the conduct of the agent. * * * Apparent authority is not founded in negligence of the principal, but in the conscious permission of acts beyond the powers granted, whereas the rule of estoppel has its basis in the negligence of the principal in failing properly to supervise and control the affairs of the agent."

§ 236. —— Another classification, believed to be the true one, includes under actual authority all that expressly conferred and all of that which, as incidental, customary or necessary, is implied in, or inferred in fact from, the express authority in the circumstances under which it was conferred—the express

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ta, South Dakota and Montana.

[25] See Dispatch Printing Co. v. National Bank (1910), 109 Minn. 440, 124 N. W. 236, 115 Minn. 157, 132 N. W. 2.

In Johnston v. Milwaukee Inv. Co. (1895), 46 Neb. 480, 64 N. W. 1100, Goddard's Cas. 322, the rule respecting apparent authority is said to be "That where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform on behalf of his principal a particular act, such particular act having been performed, the principal is estopped, as against such innocent third person, from denying the agent's authority to perform it."

In St. Louis Gunning Adv. Co. v. Wanamaker (1905), 115 Mo. App. 270, 295, 90 S. W. 737, the court approves a definition of apparent authority "that it is such authority as a reasonably prudent man, using diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess."

and the implied authority of the preceding subdivision;—and under apparent authority all that which, though it be conceded not to have been expressly conferred and not to be implied in fact under the rules governing that subject, still fairly and reasonably appeared, to the particular person relying upon it, from the acts or omissions of the principal, to have carried with it the assent and approval of the principal.

To be included in the express authority is that to which, when the parties are orally conferring, the principal gives the ordinary external evidence of assent reasonably accepted as such, even though it should now seem clear that he did not then intend it as such.[26]

§ 237. Apparent agency—Apparent ownership.—A person may apparently be the agent of another when he is not such in fact. If that other person holds him out as his agent, or clothes him, or permits him to clothe himself, with the ordinary external evidence of agency he may be bound to one who reasonably relies upon the appearance.[27]

In some cases it may be difficult to determine whether one is held out as apparent *agent* or apparent *owner*. As to some acts, it might make no difference. If it were an act which either an apparent agent or an apparent owner might do, *e. g.*, to sell the goods, it would often be immaterial; but if it were an act which an apparent owner might, but an apparent agent might not, lawfully do, *e. g.*, to use the goods to pay his own debts, the distinction would be important.

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[26] See O'Donnell v. Clinton (1887), 145 Mass. 461, 14 N. E. 747.

[27] See Pickering v. Busk (1812), 15 East 38, 13 Rev. Rep. 364, Goddard's Cas. 319, Wambaugh's Cas. 272; Nixon v. Brown (1876), 57 N. H. 34; McNeil v. Tenth Nat. Bank (1871), 46 N. Y. 325, 7 Am. Rep. 341; Heath v. Stoddard (1898), 91 Me. 499, 40 Atl. 547; Levi v. Booth (1882), 58 Md. 305, 42 Am. Rep. 332, Mechem's Cas. 391; Smith v. Clews (1887), 105 N. Y. 283, 11 N. E. 632, 59 Am. Rep. 502, 114 N. Y. 100, 21 N. E. 160, 11 Am. St. R. 627, 4 L. R. A. 392, Mechem's Cas. 396; Baehr v. Clark (1891), 83 Iowa 313, 49 N. W. 840, 13 L. R. A. 717; Quinn v. Davis (1875), 78 Pa. 15; Johnston v. Milwaukee Inv. Co. (1895), 46 Neb. 480, 64 N. W. 1100, Goddard's Cas. 322; Patterson v. Neal (1902), 135 Ala. 477, 33 So. 39, Goddard's Cas. 328.

IV. ASCERTAINING THE EXISTENCE OF THE AUTHORITY.

§ 238. Person dealing with agent must ascertain existence of his authority.—It is ordinarily incumbent upon the person who deals with an alleged agent to ascertain the fact, the nature and the extent of his authority.[28] This rule results from two considerations: *First.* The burden of proving the authority rests ordinarily upon him who alleges it. The law itself usually makes no abstract presumption of the existence of authority. That is ordinarily a fact to be proved. He who relies upon it must therefore usually be prepared to prove it. *Second.* It is believed to be fair that one who calls in aid the machinery of the law must appear to have exercised reasonable precaution for his own protection. If a loss or liability must fall upon one or the other as the fact of the authority is or is not established, the one who seeks to put it upon the alleged principal must be prepared to show that before he acted he took proper precautions for himself and did not rely too credulously upon the pretensions of the alleged agent.

The one who deals with an agent usually does so voluntarily. He is ordinarily seeking some profit or convenience for himself. He is usually in the best situation of any one to ascertain whether the assumed authority is equal to the proposed act.

§ 239. —— The necessity for inquiring as to particular limitations is obviously greater in a case of special agency, wherein from its nature such limitations are more likely to be found, than in the case of general agency, which from its nature is more likely to exclude them.

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[28] See Wheeler v. McGuire (1888), 86 Ala. 398, 5 So. 190, 2 L. R. A. 808, Mechem's Cas. 362; Latham v. Bank (1909), 92 Ark. 315, 122 S. W. 992; Cummins v. Beaumont (1880), 68 Ala. 204, Goddard's Cas. 291; Tompkins Machinery Co. v. Peter (1892), 84 Tex. 627, 19 S. W. 860; Gore v. Canada L. Ins. Co. (1898), 119 Mich. 136, 77 N. W. 650; Busch v. Wilcox (1890), 82 Mich. 337, 47 N. W. 328, 21 Am. St. R. 563; Ermentrout v. Ins. Co. (1895), 63 Minn. 305, 65 N. W. 635, 56 Am. St. R. 481, 30 L. R. A. 346.

A natural limitation upon the duty to inquire would also be presented in the case of secret instructions not intended to be disclosed; and even in the case of a special agency the duty to inquire could not reasonably be extended to whimsical, capricious or wholly unusual limitations, where there was nothing to suggest the possibility of their being present.

§ 240. **Must not rely on agent's assertions alone.**—In seeking for evidence of the authority, the person dealing with the agent may not rely upon the agent's assertions, pretensions or representations alone. No one can make himself the agent of another merely by his own acts. The assertions or representations of the alleged agent are not of themselves competent evidence of his authority.[29] The only competent evidence is that which is founded in some act or representation of the person who is sought to be held, namely, the act or representation of the alleged principal.

While the agent's testimony when called as a witness in court to testify as to the facts respecting his authority is as competent as that of any other witness, the testimony of other witnesses as to his extra judicial claims or assertions is not competent to prove his authority.[30]

§ 241. **Must beware of adverse interests.**—The person dealing with the agent must also bear in mind the rule that the agent's authority is presumptively to be used for the principal's business, and not for the agent's business. Hence where, in their dealing, it is obvious that the agent is acting in his own interest, and is proposing to use his principal's property, money or credit for his own benefit, that fact should put the person dealing with him upon inquiry as to whether the principal has in fact consented to the act or not. The presumptions are against it.[31]

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[29] See Mitrovich v. Fruit Packing Co. (1899), 123 Cal. 379, 55 Pac. 1064; Edwards v. Dooley (1880), 120 N. Y. 540, 24 N. E. 827.

[30] See *ante* § 112 *et seq.*

§ 242. **Ascertaining existence of conditions.**—Where the authority claimed is known to be one dependent upon events or conditions, the person who deals with the agent must ordinarily ascertain that the necessary events have happened, and that the conditions existing have been satisfied. He may not, as against the principal, ordinarily rely merely upon the agent's words or claims as to that.[32]

Some courts in some cases have made an exception to that rule where the evidence as to the existence of these extrinsic events or conditions is peculiarly if not necessarily in the possession of the agent, and have held that, in such cases, the agent's representation that the event had happened, made either in words or by proceeding to do the act which could only be rightfully done in case that event had happened, may be relied upon by one who deals with him in good faith and with no notice to the contrary.[33] Other courts deny the exception even in such circumstances.[34]

New York has conspicuously led in establishing this exception.

§ 243. —— A typical case is found in the issue of a bill of lading reciting the receipt of goods by the agent of a common carrier, which bill has later been taken as security by one who has advanced money or credit in reliance upon it. It is a condition precedent to the actual authority of the agent to issue such a bill, that the goods in question shall in fact have been received by him. He is peculiarly if not necessarily in a situation to know the truth about that—he has ordinarily better knowledge or means of knowledge than almost any one else, including even the principal himself. He wrongfully issues such a bill when no goods have been received, and a loss must fall upon the person who took the bill or upon the principal. In the courts which make the exception, the loss will fall upon the principal,[35] in the others, upon the holder,[36] with an action over in either case, against the guilty agent.

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[31] See Moores v. Citizens Nat. Bank (1883), 15 Fed. 141, (affi'd 111 U. S. 156, 4 Sup. Ct. 345, 28 L. Ed. 385) Goddard's Cas. 296; New York Iron Mine v. First National Bank (1878), 39 Mich. 644, Mechem's Cas. 423; Hogg v. Snaith (1808), 1 Taunt. 347, Wambaugh's Cas. 269; Bank v. Furniture Co. (1905), 57 W. Va. 625, 50 S. E 880, 70 L. R. A. 312, Goddard's Cas. 306.

[32] See Mussey v. Beecher (1849), 3 Cush. (Mass.) 511, Goddard's Cas. 293, Wambaugh's Cas 311; Craycraft v. Selvage (1874), 73 Ky. (10 Bush) 696; Weise's Appeal (1872), 72 Pa. 351; Latham v. Bank, *supra.*

[33] See Bank of Batavia v. New York, etc., R. Co. and other cases in the second note following this one.

[34] See Grant v. Norway, and other cases in the second note following this one.

§ 244. —— The same sort of question is presented where the agent of a warehouse keeper issues a warehouse receipt without actually receiving the goods alleged therein to be received; and where the transfer agent of a corporation issues a new certificate of stock, as upon a transfer, when no outstanding certificate has been surrendered for cancellation, with much the same conflict in the authorities.[37] Much the same question is also raised where an agent authorized to make negotiable instruments (which are of course expected to be made only in the principal's business) uses the authority to make such instruments ostensibly in the principal's business but really in his own. There is more unanimity here in holding the principal liable to a holder for value.[38]

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[35] See Bank of Batavia v. New York, etc., R. Co. (1887), 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440, Mechem's Cas. 576; Brooke v. New York, etc., R. Co. (1885), 108 Pa. 529, 1 Atl. 206, 56 Am. Rep. 235; Sioux City R. Co. v. First Nat. Bank (1880), 10 Neb. 556, 7 N. W. 311, 35 Am. Rep. 488; Wichita Savings Bank v. Atchison, etc., R. Co. (1878), 20 Kan. 519.

This view has been adopted in the Uniform Bills of Lading Act.

[36] See Grant v. Norway (1851), 10 Com. B. 665, Wambaugh's Cas. 368; Erb v. Great West. Ry. Co. (1881), 5 Can. S. C. 179; Friedlander v. Texas, etc., Ry. Co. (1889), 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991, Mechem's Cas. 579; National Bank of Commerce v. Chicago, etc., Ry. Co. (1890), 44 Minn. 224, 46 N. W. 342, 560, 20 Am. St. R. 566, 9 L. R. A. 263; Williams v. Wilmington R. Co. (1885), 93 N. Car. 42, 53 Am. Rep. 450; Baltimore, etc., R. Co. v. Wilkens (1875), 44 Md. 11, 22 Am. Rep. 26; Hunt v. Railroad Co. (1877), 29 La. Ann. 446; Dean v. King (1871), 22 Ohio St. 118.

[37] Compare New York, etc., R. Co. v. Schuyler (1865), 34 N. Y. 30, Wambaugh's Cas. 387; Fifth Ave. Bank v. Forty-second St. Ry. Co. (1893), 137 N. Y. 231, 33 N. E. 378, 33 Am. St. R. 712, 19 L. R. A. 331, with British Mut. Bank Co. v. Charnwood Forest Ry. Co. (1887), 18 Q. B. Div. 714, Wambaugh's Cas. 425.

§ 245. —— It is sometimes said that, however sound the exception made by the New York cases may be in the cases to which it has been made applicable, it should not be applied to cases where the authority is subject to a fixed pecuniary or numerical limit, as in Mussey v. Beecher.[39] While it is easier in such a case to compare the act with the limited authority, no other difference seems to be presented.

V. ELEMENTS OF AUTHORITY.

§ 246. Extent of authority in a particular case.—Calling to mind what was said in an earlier chapter, in connection with this one, it will be seen that the authority of an agent in any given case, so far as it concerns the rights of the person dealing with him, may be a composite matter made up of a number of elements. It may consist—

First and primarily of the authority expressly and intentionally conferred by the principal. This is always the starting point. To this may be added—

Second, implied authority to do all of those acts which are the ordinary, proper and to-be-expected incidents of the main act, and which are not known to be prohibited.

Third, implied authority to do those incidental acts, if any, which some particular usage or custom, in contemplation of which the main authority was presumptively conferred, has made appropriate attributes of the express authority, and which are not known to have been prohibited.

Fourth, implied authority to do any act justifiably regarded as incidental to the main act in view of the particular course of dealing of the parties involved or the customs of the particular business in which they were engaged, and not known to have been prohibited.

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[38] In the case of negotiable instruments wrongfully issued by an agent, really for his own benefit, though ostensibly for his principal, see North River Bank v. Aymar (1842), 3 Hill (N. Y.) 262, Wambaugh's Cas. 303; *In re* Troy Shirt Co. (1905), 136 Fed. 420, 142 Fed. 1038, 73 C. C. A. 523; Fillebrown v. Hayward (1906), 190 Mass. 472, 77 N. E. 45.

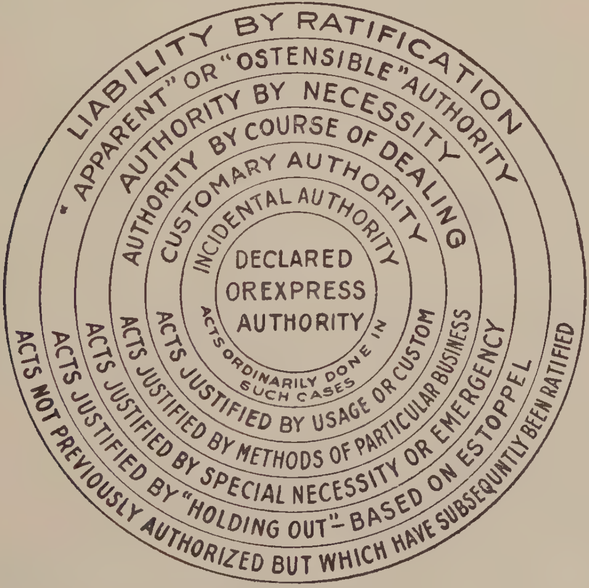
[39] *Ante* note 32.

Fifth, implied authority to do acts which some special necessity or emergency (of the sort heretofore referred to[40]) has rendered essential.

Sixth, apparent authority to do any other acts which the principal, by words or conduct, by omission or commission, has led the person dealing with the agent reasonably to believe to have been authorized in the given case (though they may not be so ordinarily) and upon which he has reasonably relied in such a way that he will be prejudiced if the authority be now denied.

Seventh, (so far as *liability* is concerned though not strictly as *authority*) responsibility for any acts, though not authorized, which the principal, with knowledge of the facts, has subsequently ratified.

§ 247. —— The following diagram may help in making this matter clear.


LIABILITY BY RATIFICATION
"APPARENT" OR "OSTENSIBLE" AUTHORITY
AUTHORITY BY NECESSITY
AUTHORITY BY COURSE OF DEALING
CUSTOMARY AUTHORITY
INCIDENTAL AUTHORITY
DECLARED OREXPRESS AUTHORITY
ACTS ORDINARILY DONE IN SUCH CASES
ACTS JUSTIFIED BY USAGE OR CUSTOM
ACTS JUSTIFIED BY METHODS OF PARTICULAR BUSINESS
ACTS JUSTIFIED BY SPECIAL NECESSITY OR EMERGENCY
ACTS JUSTIFIED BY "HOLDING OUT"– BASED ON ESTOPPEL
ACTS NOT PREVIOUSLY AUTHORIZED BUT WHICH HAVE SUBSEQUNTLY BEEN RATIFIED

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[40] See *ante* § 178.

The proper way to deal with the question of the extent of authority in any particular case is first to learn what the express and unquestioned authority was, and then to proceed from that outwardly, asking if that authority has been enlarged or expanded by any of the methods outlined in the diagram.

CHAPTER X.

OF THE CONSTRUCTION OF THE AUTHORITY.

§248. What here considered.
1. *Of Construction in General.*
249. Necessity for construction.
250. Necessity for evidence.
251. By whom construed—Court or jury.
252. Entire instrument to be consulted—Other writings.
253. Parol evidence to vary writing.
254. How construed.
255. —— Strict construction of formal powers.
2. *Of the Construction of Particular Authorities.*
256. What here included.
257. Authority to sell land—When exists.
258. —— Special agency—Strict construction.
259. —— What may be sold.
260, 261. —— What incidental authority included.
262. Authority to sell personal property.
263. —— Limited or qualified authority.
264. —— What may be sold.
265, 266. —— What incidental authority included.
267. Authority to buy.
268. —— What may be bought.
269-271. —— What incidental authority included.
272. Authority to collect or receive payment.
273. —— Implied or apparent authority.
274. —— What incidental authority included.
275. —— What may be received in payment.
276, 277. Authority to make negotiable instruments.
278. —— What acts justified.
279, 280. Authority to manage business.
281. Authority to make declarations, representations or admissions.

§ 248. **What here considered.**—Having ascertained how authority may be conferred and seen something of the rules which determine its nature and extent, it becomes material now to discover what acts may be authorized under it, and especially what incidental authority may be deduced from more general authority expressly conferred. Attention will, therefore, next be given to the question of the construction or interpretation of the authority.—1. In general, and 2. As applied to particular powers.

1. *Of Construction in General.*

§ 249. Necessity for construction.—Every person who proposes to deal with an agent, as such, must, as has been seen, ascertain not only that authority exists, but also that it is adequate to authorize the proposed act. It thus becomes necessary to examine into it, and ascertain what is its scope and effect—in other words, to construe it, to determine whether it is broad enough to meet the present need.

§ 250. Necessity for evidence.—It is also true that the person who has dealt with an agent, as such, and who desires to enforce the results against the principal, must be prepared to prove, if it be denied, not only that there was *some* authority, but also that there was *such* authority as justified the act relied upon. If it becomes necessary, therefore, to have recourse to the courts, the plaintiff must be prepared to *prove* the authority, and to show that when properly *construed* it justified the act done.

Something as to the evidence required has already been seen in an earlier section.

§ 251. By whom construed—Court—Jury.—While the party who deals with the agent must usually, in the first instance, put his own construction upon the authority, he must, when he comes into court, abide by the construction which the law puts upon it.

It is the general rule that the construction of written instruments, and the determination of the legal effect of undisputed facts, are matters for the court rather than for the jury. If, therefore, the authority is created by written instrument, the writing must in general be produced, and the nature and extent of the authority thereby conferred will be determined by the court. So, though not in writing, if the facts are not disputed, and only one inference may properly be drawn from them, the court will determine their effect; but if the facts are in dispute, or if, though not disputed, more than one inference may properly be drawn from them, it must usually be left to the jury to determine, under proper instructions from the court, whether there was any authority, and, if so, what was its extent.

§ 252. Entire instrument to be consulted—Other writings.—It is a familiar rule in construing authority in writing that the entire instrument is to be considered rather than detached or isolated portions of it only.[1] The authority may be found in several papers, if they are so physically attached or so connected by reference or so obviously relating to the same subject, that they must all be read together.

§ 253. Parol evidence to vary writing.—Although the authority be in writing parol evidence may be resorted to, if necessary, to show the situation of the parties, to clear up latent ambiguities, or to identify the parties or the subject matter. But it is not admissible to contradict or alter the writing, by showing that the parties then intended something other or different from what they declared by the writing.

But, where parol authority is competent, this rule would not prevent showing that the parties had later created an enlarged authority, or, within the rules already considered, had revoked the written authority produced and substituted another in its place.

§ 254. How construed.—In determining the scope and extent of the authority, the construction adopted must be a fair and reasonable one and not a strained or unnatural one. The authority is to be construed in the light of the surrounding circumstances and with the situation of the parties and their evident purposes in view. Thus, for example, though the language used may be general, it must be limited in its application by the specific purpose to be accomplished,[2] and must be con-

[1] See Peck v. Harriott (1820), 6 Serg. & R. (Pa.) 146, 9 Am. Dec. 415, Wambaugh's Cas. 283.

[2] See Camden Safe Deposit Co. v. Abbott (1882), 44 N. J. L. 257, Mechem's Cas. 376; Brantley v. Southern L. Ins. Co. (1875), 53 Ala. 554, Goddard's Cas. 440; Renwick v. Wheeler (1880), 48 Fed. 431, Goddard's Cas. 447.

fined in its operation to the principal's own purposes and business.[3]

So authority from several to sell or convey a joint interest will not ordinarily justify dealing with the separate interests of one of them only;[4] and an authority from a single principal to deal with his separate affairs will not ordinarily justify dealing with matters in which he was jointly interested with others.[5]

§ 255. —— Strict construction of formal instruments.—Where the authority is conferred by an express and formal instrument, the presumption is that the parties have put into it all the powers intended to be conferred. "A formal instrument delegating powers is ordinarily subjected to strict interpretation, and the authority is not extended beyond that which is given in terms, or which is necessary to carry into effect that which is expressly given. They are not subject to that liberal interpretation which is given to less formal instruments, as letters of instruction, etc., in commercial transactions, which are interpreted most strongly against the writer, especially when they are susceptible of two interpretations, and the agent has acted in good faith upon one of such interpretations."[6]

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[3] See Wood v. McCain (1845), 7 Ala. 800, 42 Am. Dec. 612; Platt v. Francis (1912), 247 Mo. 296, 152 S. W. 332; Lewis v. Lewis (1902), 203 Pa. 194, 52 Atl. 203; Stainback v. Read (1854), 11 Gratt. (Va.) 281, 62 Am. Dec. 648.

[4] See Gilbert v. How (1890), 45 Minn. 121, 47 N. W. 643, 22 Am. St. R. 724, Mechem's Cas. 380; Dodge v. Hopkins (1861), 14 Wis. 630, Wambaugh's Cas. 1044; Roy v. Mining Co. (1910), 113 Minn. 143, 129 N. W. 154.

But see *contra* Cousino v. Lumber Co. (1918), 179 Cal. 1, 175 Pac. 406.

Where a wife joins in a power of attorney apparently only for the purpose of authorizing a release of her dower right in *his* land, a conveyance of his land only may be justified: Tuman v. Pillsbury (1895), 60 Minn. 520, 63 N. W. 104; Snell v. Weyerhauser (1898), 71 Minn. 57, 73 N. W. 633.

[5] See Johnston v. Wright (1856), 6 Cal. 373; Attwood v. Munnings (1827), 7 B. & C. 278, Wambaugh's Cas. 286.

[6] See Craighead v. Peterson (1878), 72 N. Y. 279, 28 Am. Rep. 150, Mechem's Cas. 373. Powers of attorney are strictly construed: Hotchkiss v. Middlekauf (1899), 96 Va. 649, 32 S. E. 36, 43 L. R.

2. *Of the Construction of Particular Authorities.*

§ 256. What here included.—It is obviously impossible to consider every kind of authority which may be conferred upon an agent. All that will be attempted will be to refer to the common forms which most frequently present themselves.

§ 257. Authority to sell land—When exists.—Authority to *sell* land must be clearly conferred, and frequently as has been seen,[7] the statutes require that it shall be conferred by written instrument. The authority is not lightly inferred or easily deduced from general expressions, such as an authority to attend to "all business" or to do "all things concerning" the principal's business, and the like.[8]

The expression, an authority to "sell" land is used in a variety of senses:—

1. Merely placing the property in the hands of a real estate broker for sale, or listing it with a real estate agent, in the ordinary way, is usually held not to amount to an authority to sell (*i. e.*, to sell and convey, which would usually require authority under seal) or even to make a binding contract to sell. The only authority ordinarily deduced in such cases is simply to find a purchaser to whom the principal may sell.[9]

A. 806; Campbell v. Foster Home Ass'n (1894), 163 Pa. St. 609, 30 Atl. 222, 43 Am. St. R. 818, 26 L. R A. 117; Frost v. Erath Cattle Co. (1891), 81 Tex. 505, 17 S. W. 52, 26 Am. St. R. 831; Gilbert v. How (1890), 45 Minn. 121, 47 N. W. 643, 22 Am. St. R. 724, Mechem's Cas. 380; Harris v. Johnston (1893), 54 Minn. 177, 55 N. W. 970, 40 Am. St. R. 312.

[7] See *ante* § 96.

[8] See Coquillard v. French (1862), 19 Ind. 274; Billings v. Morrow (1857), 7 Cal. 171, 68 Am. Dec. 235; Ashley v. Bird (1826), 1 Mo. 640, 14 Am. Dec. 313; Hotchkiss v. Middlekauf (1899), 96 Va. 649, 32 S. E. 36, 43 L. R. A. 806.

Compare Lyon v. Pollock (1878), 99 U. S. 668, 25 L. Ed. 265, Mechem's Cas. 378, Goddard's Cas. 401; Marr v. Given (1843), 23 Me. 55, 39 Am. Dec. 600, Goddard's Cas. 396.

See also Springer v. Trust Co. (1915), 59 Colo. 376, 149 Pac. 253, Ann. Cas. 1917A, 520.

[9] See Carstens v. McReavy (1890), 1 Wash. 359, 25 Pac. 471. Goddard's Cas. 398; McCulloug v Hitchcock (1899), 71 Conn. 42 Atl. 81, Goddard's Cas. 397 Duffy v. Hobson (1870), 40 Ca 240, 6 Am. Rep. 617; Armstrong

Such a broker may frequently be expected to produce a buyer who has made a written and binding offer to purchase, although the broker would have no authority to enter into a binding contract to sell.

2. The context or the circumstances may show that the agent was authorized to sell, in the sense of making a binding contract to sell,[10] even though his authority would not justify a conveyance. Such an authority was not required to be in writing by the fourth section of the English statute of frauds, though a number of American statutes do require an authority by writing in such a case.

3. The agent may be authorized to sell *and convey*. Such an authority, where statutes have not changed the rule, usually requires, as has been seen,[11] an instrument, *e. g.*, a power of attorney, under seal.

§ 258. —— Special agency—Strict construction.—Agents authorized to sell land are frequently special agents in the sense that the land which they are authorized to sell is specifically designated and the terms upon which they are to sell are definitely specified.[12] Sometimes, on the other hand, they are authorized to sell any land which the principal may own, or any in a specified territory, and sometimes they are authorized to sell upon any terms which to them shall seem meet.

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v. Lowe (1888), 76 Cal. 616, 18 Pac. 758; Stewart v. Pickering (1887), 73 Iowa, 652, 35 N. W. 690; Stillman v. Fitzgerald (1887), 37 Minn. 186, 33 N. W. 564; Delano v. Jacoby (1892), 96 Cal. 275, 31 Pac. 290, 31 Am. St. Rep. 201.

But other courts more easily infer a power to make a contract. Compare the cases in following note.

[10] See Colvin v. Blanchard (1908), 101 Tex. 231, 106 S. W. 323; Haydock v. Stow (1869), 40 N. Y. 363; Farrell v. Edwards (1896), 8 S. Dak. 425, 86 N. W. 812; Smith v. Allen (1885), 86 Mo. 178; Johnson v. Dodge (1856), 17 Ill. 433, Wambaugh's Cas. 56; Peabody v. Hoard (1867), 46 Ill. 242.

[11] See *ante* § 88.

[12] These limitations as to time, price, terms, etc., are usually deemed to be of the essence, and must be complied with. See Glass v. Rowe (1890), 103 Mo. 513, 15 S. W. 334.

Where the authority is known to be, or is required by law to be, in writing, persons dealing with the agent are presumed to deal with the instrument before them and therefore to have notice of the extent of the agent's authority.[13]

§ 259. —— What may be sold.—As already stated, the land to be sold may be specifically described, and hence the authority be limited to that, or it may be all of a certain kind, or all in a certain state or territory, or any that the principal may own generally.[14]

Whether it will apply to land not then owned by the principal, but subsequently acquired by him, is in dispute.[15]

§ 260. —— What incidental authority included.—Authority to sell land, in the sense of making a binding engagement to sell, carries with it, unless the contrary is disclosed, implied authority to enter into a binding contract in writing, and to include the usual and proper provisions necessary to make such a contract operative.[16]

An authority to sell, in the sense of sell and convey, authorizes the execution and delivery in the principal's name of the appropriate deed of conveyance,[17] and where not limited to a mere quit-claim, also justifies, by the weight of authority, the inclusion of the ordinary covenants of general warranty where such sales are usually made with such covenants,[18] but not special or unusual warranties.[19]

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[13] See *ante* § 115.

[14] See Munger v. Baldridge (1889), 41 Kan. 236, 21 Pac. 159, 13 Am. St. R. 273; Roper v. McFadden (1874), 48 Cal. 346; Janney v. Robbins (1906), 141 N. Car. 400, 53 S. E. 863; Cummings v. Dolan (1909), 52 Wash. 496, 100 Pac. 989, 132 Am. St. R. 986; Linton v. Moorehead (1904), 209 Pa. 646, 59 Atl. 264.

A description which can be rendered definite by extrinsic evidence may suffice. Compare Vaughn v. Sheridan (1883), 50 Mich. 155, 15 N. W. 62; Lumbard v. Aldrich (1835), 8 N. H. 31, 28 Am. Dec. 381.

[15] See Penfold v. Warner (1893), 96 Mich. 179, 55 N. W. 680, 35 Am. St. R. 591, and Note, Goddard's Cas. 403.

[16] See Johnson v. Dodge (1856), 17 Ill. 433, Wambaugh's Cas. 56.

[17] See Valentine v. Piper (1839), 22 Pick. (39 Mass.) 85, 33 Am. Dec. 715, Goddard's Cas. 405; Marr v. Given (1843), 23 Me. 55, 39 Am. Dec. 600, Goddard's Cas. 396; Farnham v. Thompson (1885), 34 Minn. 330, 26 N. W. 9, 57 Am. Rep. 59.

§ 261. —— The authority in either case would ordinarily justify the agent in receiving so much of the purchase price as is to be paid coincidentally with the act that he is to perform,[20] but not usually postponed or deferred payments. These also might fall within his authority, however, if the control of the matter is still left in his hands.[21]

The authority to sell would not ordinarily authorize a sale upon credit[22] (though it would be otherwise where he was authorized to grant terms[23]); nor a mortgage, or an exchange, or a dedication to public use, or a conveyance in payment of the principal's debts and certainly not of the agent's own debt.[24]

An authority to sell would ordinarily be exhausted when the sale was made, and the agent would therefrom have no implied authority afterwards to alter or rescind the contract made.[25]

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[18] See Vanada v. Hopkins (1829), 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92; Leroy v. Beard (1850), 8 How. (U. S.) 451, 12 L. Ed. 1151, Mechem's Cas. 382; Peters v. Farnsworth (1843), 15 Vt. 155, 40 Am. Dec. 671, Mechem's Cas. 387; Schultz v. Griffin (1890), 121 N. Y. 294, 24 N. E. 480, 18 Am. St. R. 825, Goddard's Cas. 406.

[19] See National Iron Armor Co. v. Bruner (1868), 19 N. J. Eq. 331. Compare Bennett v. Judson (1860), 21 N. Y. 238 (action for deceit). McKinnon v. Vollmar (1889), 75 Wis. 82, 43 N. W. 800, 17 Am. St. R. 178, 6 L. R. A. 121 (action for rescission).

[20] See Mann's Ex'rs v. Robinson (1881), 19 W. Va. 49, 42 Am. Rep. 771, Goddard's Cas. 408; Peck v. Harriott (1820), 6 Serg. & R. (Pa.) 146, 9 Am. Dec. 415, Wambaugh's Cas. 283.

[21] See Peck v. Harriott, *supra;* Mann v. Robinson, *supra.*

[22] Sales presumptively to be for cash: Alcorn v. Gieseke (1910), 158 Cal. 396, 111 Pac. 98; Horst v. Lightfoot (1910), 103 Tex. 643, 132 S. W. 761; Bowles v. Rice (1907), 107 Va. 51, 57 S. E. 575; Winders v. Hill (1906), 141 N. Car. 694, 54 S. E. 440.

[23] See Peck v. Harriott, *supra;* Carson v. Smith (1860), 5 Minn. 78, 77 Am. Dec. 539.

[24] See Lumpkin v. Wilson (1871), 5 Heisk. (Tenn.) 555, Mechem's Cas. 390; Campbell v. Foster Home Ass'n (1894), 163 Pa. 609, 30 Atl. 222, 43 Am. St. R. 818, 26 L. R. A. 117; Hawxhurst v. Rathgeb (1898), 119 Cal. 531, 51 Pac. 846, 63 Am. St. R. 142; Frost v. Cattle Co. (1891), 81 Tex. 505, 17 S. W. 52, 26 Am. St. R. 831.

§ 262. **Authority to sell personal property.**—Unlike the case of real estate, authority to sell personal property is not ordinarily required to be conferred by written instrument. It may be created by words or conduct, and may be express or implied. It is the general rule in regard to chattels, not including negotiable instruments, that no person can transfer a better title than he himself has. Authority to sell is not to be inferred from the mere fact of possession; but where the true owner has clothed another not only with possession but with the ordinary evidence of ownership or agency, as where he delivers to him securities endorsed in blank, or permits the title to stand in his name, or does other acts from which an authority to sell may reasonably be inferred, he may be estopped from asserting his title as against a *bona fide* purchaser from the person so in possession.[26]

§ 263. —— **Limited or qualified authority.**—As in the case of the agent to "sell" land, not every so-called "salesman" will have an unqualified authority to sell. The ordinary "commercial traveler" or "drummer" has usually no authority to make a binding contract, but is merely to solicit orders to be sent to his principal who will decide whether they shall be filled or not.[27] Many other "agents" also are usually merely canvassers or solicitors, *e. g.*, subscription book-agents, life insurance solicitors, salesmen of stock in corporations to be formed, and the like, with no authority to close present contracts. The canvasser and the peddler represent distinct types.

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[25] See Fullerton v. McLaughlin (1893), 70 Hun (N. Y. 568, 24 N. Y. St. 280, Goddard's Cas. 413; West End Land Co. v. Crawford (1897), 120 N. Car. 347, 27 S. E. 31.

[26] See Pickering v. Busk (1812), 15 East 38, Goddard's Cas. 319, Wambaugh's Cas. 272; Levi v. Booth (1882), 58 Md. 305, 42 Am. Rep. 332, Mechem's Cas. 391; Smith v. Clews (1887), 105 N. Y. 283, 11 N. E. 632, 59 Am. Rep. 502, Mechem's Cas. 396; McNeil v. Tenth National Bank (1871), 46 N. Y. 325, 7 Am. Rep. 341; Nixon v. Brown (1876), 57 N. H. 34; Biggs v. Evans [1894], 1 Q. B. 88, Wambaugh's Cas. 355; Peerless Machine Co. v. Gates (1895), 61 Minn. 124, 63 N. W. 260, Goddard's Cas. 362; Covill v. Hill (1847), 4 Denio (N. Y.) 323, Goddard's Cas. 363; Heath v. Stoddard (1898), 91 Me. 499, 40 Atl. 547, Goddard's Cas. 365.

Inference from sending goods to a place at which it is the usual business of the proprietor to sell, *e. g.*, a sales stable for horses, a salesroom for used automobiles, an auctioneer's room. See Pickering v. Busk (1812), 15 East 38, Goddard's Cas. 319, Wambaugh's Cas. 272; Biggs v. Evans [1894], 1 Q. B. 88, Wambaugh's Cas. 355; Carter v. Rowley (1922), — Cal. App. —, 211 Pac. 267.

Of course, express authority in a particular case or implied authority reasonably deduced from a course of conduct, may alter the situation.

§ 264. —— What may be sold.—The agent may, of course, sell what he was authorized to sell; usually no more,[28] often no less.[29] Authority to sell a house would not ordinarily justify selling half of the house; but authority to sell a team of horses would not so clearly forbid selling each horse separately or, in the effort to sell both, selling one in the expectation that he could then sell the other, even though that expectation should not be realized.[30] Where the article is divisible and may be sold in installments, a sale of one installment would not usually be defeated by a failure to sell a subsequent one.

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[27] See Bauman v. McManus (1907), 75 Kan. 106, 89 Pac. 15, 10 L. R. A. (N. S.) 1138; Ryan v. American Steel Wire Co. (1912), 148 Ky. 481, 146 S. W. 1099; Becker v. Clardy (1908), 96 Miss. 301, 51 So. 211, Ann. Cas. 1912B, 355.

A mere authority to *deliver* goods is not an authority to *sell* them. Whittaker v. Forshaw [1919], 2 K. B. 419.

[28] See Blackmer v. Summit Coal Mining Co. (1900), 187 Ill. 32, 58 N. E. 289; Jenkins v. Alpha Cement Co. (1906), 77 C. C. A. 625, 147 Fed. 641.

Authority to sell a yacht does not justify also the sale of a launch merely because it was sometimes used as a tender to the yacht: Forrest v. Vanderbilt (1901), 46 C. C. A. 611, 107 Fed. 734, 52 L. R. A. 473.

Compare Wheeler v. Northwestern Sleigh Co. (1889), 39 Fed. 347, Mechem's Cas. 138.

[29] See Henry v. Buckner (1889), 13 Colo. 18, 21 Pac. 216; Hatch v. Taylor (1840), 10 N. H. 538, Mechem's Cas. 345, Wambaugh's Cas. 291; Ulster County Savings Inst. v. Fourth Nat. Bank (1889), 54 Hun (N. Y.) 638, 8 N. Y. Supp. 162, 28 N. Y. St. Rep. 24.

[30] What is authorized—the sale of a team or the sale of two horses?

§ 265. —— **What incidental acts included.**—A general authority to *sell* personal property carries with it by implication, unless the contrary appears, incidental authority to fix (within the limit of what is usual and reasonable) the terms and conditions of the sale,[31] (not so, however, where from blanks or forms produced or otherwise it is reasonably obvious that the terms and conditions have been prescribed by the principal;[32])

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[31] See Daylight Burner Co. v. Odlin (1871), 51 N. H. 56, 12 Am. Rep. 45, Goddard's Cas. 379; Stirn v. Hoffman House Co. (1894), 8 N. Y. Misc. 246, 28 N. Y. Supp. 724, 59 N. Y. St. Rep. 229, Goddard's Cas. 381; Putnam v. French (1881), 53 Vt. 402, 38 Am. Rep. 682; Galbraith v. Weber (1910), 58 Wash. 132, 107 Pac. 1050, 28 L. R. A. (N. S.) 341; French Piano Co. v. Cardwell (1901), 114 Ga. 340, 40 S. E. 292.

In the case of a *special* agent, the authority may be much more restricted, as persons dealing with him are put upon their guard by the fact that he is obviously dealing in a special case. See Sloan v. Brown (1910), 228 Pa. 495, 77 Atl. 821, 139 Am. St. R. 1019; Hardwick v. Kirwan (1900), 91 Md. 285, 46 Atl. 987; McManus v. Fortescue [1907], 2 K. B. 1.

[32] See Brown v. West (1897), 69 Vt. 440, 38 Atl. 87, Goddard's Cas. 384; Metropolitan Mfg. Co. v. Lau (1908), 61 N. Y. Misc. 105; Fulton v. Sword Medicine Co. (1906), 145 Ala. 331, 40 So. 393; Schlitz Brewing Co. v. Grimmon (1905), 28 Nev. 235, 81 Pac. 43.

Price: Where nothing is said by the principal as to price, authority to sell would ordinarily include authority in the agent to fix the price, within the limit of what is usual, or fair and reasonable, at any rate; if the principal prescribes the price and reasonably discloses it, as for example, by printing it on the circulars, advertisements, tickets, and the like, which accompany the sale, or by stamping or otherwise affixing it to the goods themselves, etc., that price would ordinarily control; if the business is such that buyers would fairly know that there must be a price fixed by the principal, *e. g.*, sales of railroad tickets, goods in most large stores, stocks and bonds sold in the public markets, etc., that fact would ordinarily put the buyer upon inquiry.

If, on the other hand, the principal evidently expected the agent to negotiate, to endeavor to get as high a price as possible, and, although he may have named a minimum price to the agent, did not expect him to disclose it to the buyer (for fear of cutting off to warrant the principal's title; to give warranties of quality or fitness, if, and only if, such warranties are usually given upon the sale of such property at that time and place;[33] and to receive so much of the purchase price as is to be paid at the time of and as part of such sale,[34] (but not ordinarily that

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the chance of getting more), what was thus said about price would usually be regarded as secret instructions merely, and the principal may be bound by a less price, if not so unreasonably low as to properly arouse suspicion. See Hatch v. Taylor (1840), 10 N. H. 538, Mechem's Cas. 345, Wambaugh's Cas. 291; Galbraith v. Weber *supra;* Towle v. Leavitt (1851), 23 N. H. 360, 55 Am. Dec. 195, Mechem's Cas. 358; Whitehead v. Tuckett (1812), 15 East 400, Wambaugh's Cas. 277; Bass Dry Goods Co. v. Granite City Mfg. Co. (1903), 119 Ga. 124, 45 S. E. 980, Goddard's Cas. 351.

[33] Some cases have made a distinction between the agent of a dealer and a non-dealer, *e. g.*, on the sale of a horse, the agent of the non-dealer would have no implied authority to warrant quality. See Brady v. Todd (1861), 9 Com. B. (N. S.) 592, Goddard's Cas. 373, Wambaugh's Cas. 328; Cooley v. Perrine (1879), 41 N. J L. 322, 32 A. Rep. 210 (affirmed 42 N. J. L. 623).

But the weight of authority makes it turn upon usage. See Pickert v. Marston (1887), 68 Wis. 465, 32 N. W. 550, 60 Am. Rep. 876, Mechem's Cas. 411; Wait v. Borne (1890), 123 N. Y. 592, 25 N. E. 1053; Smith v. Tracy (1867), 36 N. Y. 79, Mechem's Cas. 154; Court v. Snyder (1891), 2 Ind. App. 440, 28 N. E. 718, 50 Am. St. R. 247; Westurn v. Page (1896), 94 Wis. 251, 68 N. W 1003, Goddard's Cas. 376; Conkling v. Standard Oil Co. (1908), 138 Iowa 596, 116 N. W. 822, Goddard's Cas. 377; Edwards v. Dillon (1893), 147 Ill. 14, 35 N. E. 135, 37 Am. St. R. 199; Herring v. Skaggs (1878), 62 Ala. 180, 34 Am. Rep. 4, Goddard's Cas. 370.

Unusual or extraordinary warranty not thus justified: Upton v. Suffolk County Mills (1853), 11 Cush. (65 Mass.) 586, 59 Am Dec. 163, Goddard's Cas. 378. Wambaugh's Cas. 316.

[34] Agent authorized to sell *and deliver* goods would have implied authority to receive so much of the price as was then to be paid, delivery and payment being usually concurrent acts. See Butler v. Dorman (1878), 68 Mo. 298, 30 Am. Rep. 795; Bailey v. Pardridge (1890), 35 Ill. App. 121, 134 Ill. 188, 27 N. E. 89; Petersen v. Pacific-Am. Fisheries (1919), 108 Wash. 63, 183 Pac. 79, 8 A. L. R. 198 and *Note.*

Broker, who has not possession, would have no implied authority to receive payment for goods whose sale he negotiates, but a factor, who has possession, might do so. Higgins v. Moore (1866), 34 N. Y. 417, Goddard's Cas. 390;

falling due after the sale is completed unless the matter still remains in his hands).[35]

§ 266. —— Authority to sell would usually be interpreted to mean a sale by private negotiation and not by auction or other similar form of forced sale.[36] It would not ordinarily justify a sale upon credit, unless that is usual;[37] or an exchange

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Lawrence Gas Co. v. Hawkeye Oil Co. (1917), 182 Iowa 179, 165 N. W. 445, 8 A. L. R. 192, and *Note.*

Travelling salesman, *i. e.*, a "drummer" who is merely authorized to solicit orders for goods to be sent by his principal, and who has not possession of the goods and does not deliver them, has no implied authority to receive payment, either at the time he takes the order or later. See Kornemann v. Monaghan (1871), 24 Mich. 36; McKindly v. Dunham (1882), 55 Wis. 515, 13 N. W. 485, 42 Am. Rep. 740, Mechem's Cas. 399; Scarritt-Comstock Furn. Co. v. Hudspeth (1907), 19 Okla. 429, 91 Pac. 843, 14 Ann. Cas. 857; Kane v. Barstow (1889), 42 Kan. 465, 22 Pac. 588, 16 Am. St. R. 490; Hahnenfeld v. Wolff (1895), 15 N. Y. Misc. 133, 36 N. Y. Supp. 473, 71 N. Y. St. Rep. 869, Goddard's Cas. 393.

Compare Putnam v. French (1881), 53 Vt. 402, 38 Am. Rep. 682; Trainor v. Morison (1886), 78 Me. 160, 3 Atl. 185, 57 Am. Rep. 790.

Notice of the lack of authority in such agents to collect is often given by warnings printed or stamped upon bills, invoices, and the like, and may be effective where an authority might otherwise be implied if the notice is actually brought home to the party or is so obvious as not to be ignored, etc. See McKindly v. Dunham, *supra;* Putnam v. French, *supra;* Trainor v. Morison, *supra.*

The actual and the apparent authority of the only clerk in a small store to receive payment may easily be greater than that of a salesman in a great store where cashiers are provided or bills are payable at the office. Authority to receive payment at the store would not necessarily justify going out to collect bills.

[35] See Howard v. Rice (1875), 54 Ga. 52, Goddard's Cas. 392.

[36] See Towle v. Leavitt (1851), 23 N. H. 360, 55 Am. Dec. 195, Mechem's Cas. 358.

[37] See Payne v. Potter (1859), 9 Iowa 549, Goddard's Cas. 382; Kops v. Smith (1904), 137 Mich. 28, 100 N. W. 169; Bowles v. Rice (1907), 107 Va. 51, 57 S. E. 575; Norton v. Nevills (1899), 174 Mass. 243, 54 N. E. 537.

In the case of factors, see Pinkham v. Crocker (1885), 77 Me. 563, 1 Atl. 827, Mechem's Cas. 676

or barter;[38] or include authority to mortgage or pledge the property,[39] or to apply it to the agent's own use,[40] or to make any unusual or special contract.[41]

When an agent authorized merely to sell goods has made a sale his authority is usually exhausted, and he has thereby ordinarily no authority to afterwards rescind the sale or agree to take back the goods.[42]

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[38] See Trudo v. Anderson (1862), 10 Mich. 357, 81 Am. Dec. 795; Taylor v. Starkey (1879), 59 N. H. 142, Goddard's Cas. 384; Kearns v. Nickse (1907), 80 Conn. 23, 66 Atl. 779, 10 L. R. A. (N. S.) 1118, 10 Ann. Cas. 420; Clough v. Whitcomb (1870), 105 Mass. 482, Goddard's Cas. 367.

Compare Billings v. Mason (1888), 80 Me. 496, 15 Atl. 59, Mechem's Cas. 406.

[39] See Kiefer v. Klinsick (1895), 144 Ind. 46, 42 N. E. 447; Edgerly v. Cover (1898), 106 Iowa 670, 77 N. W. 328; Hawxhurst v. Rathgeb (1898), 119 Cal. 531, 51 Pac. 846, 63 Am. St. R. 142.

[40] See Hook v. Crowe (1905), 100 Me. 399, 61 Atl. 1080, Goddard's Cas. 386; Stewart v. Woodward (1877), 50 Vt. 78, 28 Am. Rep. 488, Wambaugh's Cas. 342; Wheeler & Wilson Mfg. Co. v. Givan (1877), 65 Mo. 89; Wilson v. Wilson-Rogers (1897), 181 Pa. 80, 37 Atl. 117.

[41] That a travelling salesman may bind his principal by hiring horses, etc., to transport his samples has been both affirmed and denied. See Bentley v. Doggett (1881), 51 Wis. 224, 8 N. W. 155, 37 Am. Rep. 827, Wambaugh's Cas. 345; Huntley v. Mathias (1884), 90 N. Car. 101, 47 Am. Rep. 516, Mechem's Cas. 408; Oxweld Co. v. Hughes (1915), 126 Md. 437, 95 Atl. 45, Ann. Cas. 1917C, 837; Nicholson v. Pease (1889), 61 Vt. 534, 17 Atl. 720; Howe Machine Co. v. Ashley (1877), 60 Ala. 496.

Contract of a travelling salesman to give an exclusive agency to a particular buyer, *held*, to be within his apparent authority: Keith v. Herschberg Optical Co. (1886), 48 Ark. 138, 2 S. W. 777. Goddard's Cas. 326.

But authority to sell at a certain price, *held*, not to justify a warranty that the principal would not later sell similar goods at a less price. Anderson v. Bruner (1873), 112 Mass. 14.

Authority to sell goods does not justify an agreement that the principal would take back all goods which buyer had not resold by the end of the season: Friedman v. Kelly (1907), 126 Mo. App. 279, 102 S. W. 1066; or that the principal will find buyers for him: Beck v. Freund (1909), 117 N. Y. Supp. 193; or that the principal will pay for fitting up a place *e. g.*, a saloon, in which to sell them: Schoenhofen Brewing Co. v. Wengler (1894), 57 Ill. App. 184.

Travelling salesman no implied authority to make contracts to advertise his principal's goods on bill-boards, U. S. Bedding Co. v. Andre (1912), 105 Ark. 111, 150 S. W. 413, Ann. Cas. 1914D, 800, and Note.

If the sale were not yet complete, or if he had a continuing general authority, the case would be different.[43]

§ 267. Authority to buy.—An agent may be authorized to buy goods for his principal either expressly or by implication. A case of the latter kind would be one wherein he was placed in a position, *e. g.*, the manager of a hotel, as to which the authority to buy would be deemed a natural or usual incident.[44] So, also, where the purchase of the thing in question could fairly be deemed necessary to the execution of the authority given him.

But authority to buy is not to be implied merely because the agent had authority to do some other kind of act, as, for example, to sell goods, or solicit orders for goods, or to perform labor, or to superintend work.[45] Authority to buy a given thing upon a particular occasion does not justify the purchase of even the same kind of thing upon a different occasion,[46] much less the purchase of a different thing.

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[42] See Bradford v. Bush (1846), 10 Ala. 386, Goddard's Cas. 394; Diversy v. Kellogg (1867), 44 Ill. 114, 92 Am. Dec. 154; Adrian v. Lane (1879), 13 S. Car. 183; Brigham v. Hibbard (1896), 28 Oreg. 386, 43 Pac. 383; American Sales Book Co. v. Whitaker (1911), 100 Ark. 360, 140 S. W. 132, 37 L. R. A. (N. S.) 91.

[43] See Denman v. Bloomer (1849), 11 Ill. 177, Goddard's Cas. 395; Blaess v. Nichols & Shepard Co. (1902), 115 Iowa 373, 88 N. W. 829.

As to authority of agent for sale of agricultural implements to alter the contract made by him, see Bannon v. Aultman (1891), 80 Wis. 307, 49 N. W. 967, 27 Am. St. R. 37; Peterson v. Wood M. & R. Co. (1896), 97 Iowa 148, 66 N. W. 96, 59 Am. St. R. 399; Warder v. Pischer (1901), 110 Wis. 363, 85 N. W. 968.

Such an agent may, it is held, make a contract of sale conditioned that the machine shall work well or satisfy the customer, and if it does not, may take it back. See Oster v. Mickley (1886), 35 Minn. 245, 28 N. W. 710; Deering v. Thom (1882), 29 Minn. 120, 12 N. W. 350.

[44] See Beecher v. Venn (1877), 35 Mich. 466, Goddard's Cas. 352; Stuart v. Adams (1891), 89 Cal. 367, 26 Pac. 970; Heald v. Hendy (1891), 89 Cal. 632, 27 Pac. 67; Goss v. Helbing (1888), 77 Cal 190, 19 Pac. 277; Jefferds v. Alvard (1890), 151 Mass. 94, 23 N. E. 734; Montgomery Furn. Co. v. Hardaway (1893), 104 Ala. 100, 16 So. 29.

[45] See Keyes Co. v. Union Pa-

§ 268. —— **What he may buy.**—The thing which the agent may buy would be presumptively only that which he was authorized to buy. Authority to buy land would not ordinarily justify the purchase of goods. A special authority to buy an automobile would not justify the purchase of a sewing-machine or a typewriter. If the authority were inferred from his position, the goods must be such as belong to the position or business in which he was placed.[47] While the manager of a hotel may have authority to buy supplies for the hotel, he would thereby have no implied authority to buy supplies for the principal's or his own private and separate residence.[48] If the agent had a general authority to buy, his purchase of what would naturally fall within it, could not, as to an innocent seller, be affected by the fact that the principal had instructed him not to buy those particular goods.

As to quantity the same considerations would apply. A special agent may usually not buy more nor, often, less than he was authorized.[49]

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cific Tea Co. (1908), 81 Vt. 420, 71 Atl. 201; Doan v. Duncan (1856), 18 Ill. 96; Gage v. Callahan (1908), 57 N. Y. Misc. 479; Wright v. Gly [1902], 1 K. B. 745.

[46] See Smith Premier Typewriter Co. v. National Light Co. (1911), 72 N. Y. Misc. 405, 130 N. Y. Supp. 136, Goddard's Cas. 354; Rice v. James (1907), 193 Mass. 458, 79 N. E. 807.

[47] See Wallis Tobacco Co. v. Jackson (1892), 99 Ala. 460, 13 So. 120; Carter v. Burnham (1876), 31 Ark. 212; *In re* Miley (1911), 187 Fed. 177.

[48] See Wallis Tobacco Co. v. Jackson, *supra;* Wales-Riggs Plantations v. Dye (1912), 105 Ark. 446, 151 S. W. 998; Young v. Cattle Co. (1907), 79 Neb. 268, 112 N. W. 560.

[49] If an agent, for example, were authorized to buy 100 horses, not necessarily in one lot, his contract to buy 110, and his contract to buy 50, would obviously not be governed by the same considerations. The former is clearly excessive; the latter may be merely a proper step in the purchase of the authorized number. But if the authority were to sell horse, wagon and harness, may he sell the harness only?

A general agent's purchase of what appeared proper and reasonable would not be affected by unknown instructions, or by the fact that the agent had already purchased enough from some one else.

If an agent authorized to buy were apparently buying for his principal, the fact that the agent later wrongfully appropriated the goods to his own use would not release the principal.[50]

§ 269. —— What incidental acts justified.—An agent authorized to buy, but with no terms prescribed by the principal would have implied authority to agree upon such terms as properly and necessarily must accompany the purchase. In the case of a special agent, the principal may prescribe terms which may not ordinarily be disregarded; a general agent might bind his principal by a purchase apparently within his general authority even though there were undisclosed instructions to the contrary. If directed to buy, but not supplied with funds, the agent may buy upon the principal's credit.[51] But where he is supplied with funds and is directed not to pledge the principal's credit, and has not been held out as having a wider authority, and no usage has been shown, the principal will not ordinarily be bound if his directions are ignored.[52] If authorized to buy with funds to be supplied by the principal, and the principal failed to supply the funds, the agent would have no implied authority to borrow the money.[53] But where the agreement is to furnish money at stated intervals to pay bills previously contracted, and the agent was not expected to pledge his own credit for them, authority to pledge the principal's credit for the goods so previously purchased may be implied.[54]

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[50] See Bond v. Gibson (1808), 1 Camp. 185.

[51] See Brittain v. Westall (1904), 137 N. Car. 30, 49 S. E. 54; Sprague v. Gillett (1845), 50 Mass. (9 Metc.) 91, Goddard's Cas. 360.

[52] See Komorowski v. Krumdick (1882), 56 Wis. 23, 13 N. W. 881, Mechem's Cas. 413; Saugerties Steamboat Co. v. Miller (1902), 76 N. Y. App. Div. 167, 78 N. Y. Supp. 451, Goddard's Cas. 358; Wheeler v. McGuire (1888), 86 Ala. 398, 5 So. 190, 2 L. R. A. 808, Mechem's Cas. 362; Taft v. Baker (1868), 100 Mass. 68.

As to an apparently general agent, see Morey v. Webb (1874), 58 N. Y. 350, Goddard's Cas. 361.

[53] See Swindell v. Latham (1907), 145 N. Car. 144, 58 S. E. 1010, 122 Am. St. R. 430. (No ratification if principal receives the goods not knowing of the borrowing.)

§ 270. —— Even though the agent might be deemed authorized to buy on his principal's credit, he would not ordinarily be justified in giving a negotiable promissory note in the principal's name for the price.[55] But authority to buy on the principal's credit would justify making the natural and ordinary representations as to the principal's solvency and credit without which the seller would not sell the goods.[56]

§ 271. —— An agent authorized to buy goods would have therefrom no implied authority to sell the goods so bought or other goods. And a special agent authorized to buy and who had done so, would usually thereby have exhausted his authority, and would not be authorized later to rescind, release from or alter the contract made; though one having a continuing and more general authority might perhaps do so.[57]

§ 272. **Authority to collect or receive payment.**—As in the other cases already considered, authority to collect or receive payment may be conferred expressly or by implication. As has been seen, authority to sell and *convey* land,[58] or to sell and *deliver* goods,[59] will usually justify an inference of authority to receive so much of the price as, by the terms of the sale, is to be paid where and when those acts are to be performed; but this inference does not extend to payments to be made afterwards, unless the matter is still left in the agent's charge.

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[54] See Larivee v. A'Hearn (1911), 207 Mass. 288, 93 N. E. 703.

[55] See Temple v. Pomroy (1855), 4 Gray (Mass.) 128, Wambaugh's Cas. 319.

[56] See Morris v. Possner (1900), 111 Iowa 335, 82 N. W. 755. Compare Meyerhoff v. Daniels (1896), 173 Pa. 555, 34 Atl. 298, 51 Am. St. R. 782.

[57] See Anderson v. Coonley (1839), 21 Wend. (N. Y.) 279; Elevator Co. v. Vandeventer (1898), 80 Ill. App. 669.

[58] See *ante* § 261.

[59] See *ante* § 265.

It must be kept in mind that one who contends that he has discharged a debt by payment to an agent, has ordinarily the burden of establishing his authority to receive it.

§ 273. —— Implied or apparent authority.—Authority to receive payment is not to be implied merely from the fact that the agent had previously sold the goods for which the money is now due, or negotiated the contract or loan upon which it is now payable.[60] The principal may, of course, now give him actual authority to receive the payment,[61] and authority to receive payment in a given case may be inferred from the principal's knowledge of and acquiescence in a course of conduct in similar cases.[62]

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[60] Thus as has been seen, *ante* § 265, n. a traveling salesman, or "drummer," authorized to solicit orders for goods to be sent by his principal, and who takes such an order for goods which are so supplied, has thereby no implied authority to subsequently collect payment for them. McKindly v. Dunham (1882), 55 Wis. 515, 13 N. W. 485, 42 Am. Rep. 740, Mechem's Cas. 399; Janney v. Boyd (1883), 30 Minn. 319, 15 N. W. 308; Butler v. Dorman (1878), 68 Mo. 298, 30 Am. Rep. 795; Simon v. Johnson (1894), 105 Ala. 344, 16 So. 884, 53 Am. St. Rep. 125; Kornemann v. Monaghan (1871), 24 Mich. 36 and other cases there cited.

As to the broker, who does not have possession, see Lawrence Gas Co. v. Hawkeye Oil Co. (1917), 182 Iowa 179, 165 N. W. 445, 8 A. L. R. 192, and *Note.*

As to the loan agent, see Smith v. Kidd (1877), 68 N. Y. 130, 23 Am. Rep. 157, Goddard's Cas. 419; Joy v. Vance (1895), 104 Mich. 97, 67 N. W. 140, Goddard's Cas. 417; Fortune v. Stockton (1899), 182 Ill. 454, 55 N. E. 367; Security Co. v. Graybeal (1892), 85 Iowa 543, 52 N. W. 497, 39 Am. St. R. 311.

Notice of Lack of Authority may be given by a sufficiently prominent or conspicuous and unequivocal statement on the bill, or by letter, or by an express provision in the contract, and the like: See McKindly v. Dunham, *supra;* Law v. Stokes (1867), 32 N. J. L. 249, 90 Am. Dec. 655; Putnam v. French (1881), 53 Vt. 402, 38 Am. Rep. 682; Trainor v. Morison (1886), 78 Me. 160, 57 Am. Rep. 790; Metz v. Building & Sav. Ass'n (1907), 117 N. Y. App. Div. 825, 102 N. Y. Supp. 980; Pioneer Mortgage Co. v. Randall (1923), — Kan. —, 213 Pac. 668.

[61] Sending coupons or notes. etc., to the agent for collection is one of the most common and unequivocal methods of conferring actual authority.

Even if no actual authority can thus be shown, an "apparent" authority may at times be established, as in the case of the loan agent. In the latter case from the fact that the securities, as for example the note or bond and mortgage, are left or put in the possession of the *agent who negotiated the loan,* (even without actual authority to receive payment), an apparent authority to receive payment is said to arise which will protect a *bona fide* payer who relies upon it.[63] Not so, however, where the person paying did not know or was not truthfully told, that the agent had the possession of the securities at the time he made the payment.[64]

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[62] In a great many cases courts have held that an inference of authority to receive payment might properly be drawn from courses of dealing or conduct, although the agent did not have possession of the securities, as for example where the principal had repeatedly permitted, acquiesced in or encouraged the act of the agent in collecting, remitting, renewing, etc., without express instructions and without objection.

See General Convention v. Torkelson (1898), 73 Minn. 401, 76 N. W. 215; Springfield Sav. Bank v. Kjaer (1901), 82 Minn. 180, 84 N. W. 752; Townsend v. Studer (1899), 109 Iowa 103, 80 N. W. 210; Harrison v. Legore (1899), 109 Iowa 618, 80 N. W. 670; Fowle v. Outcalt (1902), 64 Kan. 352, 67 Pac. 889; Bissell v. Dowling (1898), 117 Mich. 646, 76 N. W. 100; Harrison Nat. Bank v. Austin (1902), 65 Neb. 632, 91 N. W. 540, 101 Am. St. R. 639, 59 L. R. A. 294, Goddard's Cas. 423; Johnston v. Investment Co. (1895), 46 Neb. 480, 64 N. W. 1100; Campbell v. Gowans (1909), 35 Utah 268, 100 Pac. 397, 23 L. R. A. (N. S.) 414, 19 Ann. Cas. 660; Bautz v. Adams (1907), 131 Wis. 152, 111 N. W. 69, 120 Am. St. R. 1030.

[63] See Crane v. Gruenewald (1890), 120 N. Y. 274, 24 N. E. 456, 17 Am. St. R. 643, Mechem's Cas. 87; Central Trust Co. v. Folsom (1901), 167 N. Y. 285, 60 N. E. 599; Doubleday v. Kress (1872), 50 N. Y. 410, 10 Am. Rep. 502; Haines v. Pohlman (1874), 25 N. J. Eq. 179; Union Trust Co. v. McKeon (1904), 76 Conn. 508, 57 Atl. 109; Stiger v. Bent (1884), 111 Ill. 328; Jolly v. Huebler (1908), 132 Mo. App. 675, 112 S. W. 1013; Pioneer Mortgage Co. v. Randall (1923), — Kan. —, 213 Pac. 668.

In such a case, if the principal retains possession of the securities, the fact that the agent made the loan is not alone enough. Joy v. Vance, *supra;* Smith v. Kidd, *supra;* Fortune v. Stockton, *supra.*

The fact that the money is made payable at the office of the agent is not of itself enough to show either actual or apparent authority in him to receive the payment.[65]

Actual authority to receive payment of one of several bonds by depositing that one for collection would not of itself give authority to receive payment of the others not deposited for collection.[66]

§ 274. —— Incidental acts.—Authority to receive interest does not of itself justify receiving payment of the principal.[67] Authority to receive payment will not justify a sale,[68] release or compromise of the debt,[69] an extension of the time,[70] a change in the terms,[71] a receipt before maturity where this might prejudice the principal,[72] or even a partial payment within the same limitation.[73] Mere authority to demand or receive payment would not justify suits at law to collect, but an agent charged with the duty of collecting might be justified in suing.[74] Having received the money, the agent would have no implied authority to loan it, reinvest it, pay debts with it, buy goods with it, or, in general, do anything else than account for it to his principal.[75] He may properly give, upon receiving the money, such a receipt or acquittance as is customary in such cases.[76]

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[64] See Crane v. Gruenewald, *supra*.

According to these cases possession of the securities (unless given to the agent in order that he might collect, in which case he would have actual authority) will not suffice; the payer must have been deceived by that fact into believing that the agent had an authority which in fact he did not possess. Withdrawing papers previously held (but not so as to create a continuing actual authority) destroys the appearance of authority: Bloomer v. Dau (1899), 122 Mich. 522, 81 N. W. 331.

[65] See Bartel v. Brown (1899), 104 Wis. 493, 80 N. W. 801; Klindt v. Higgins (1895), 95 Iowa 529, 64 N. W. 414; Ward v. Smith (1869), 74 U. S. (7 Wall.) 447, 19 L. Ed. 207, Wambaugh's Cas. 339.

[66] See Ward v. Smith, *supra*.

[67] See Doubleday v. Kress (1872), 50 N. Y. 410, 10 Am. Rep. 502; Hoffmaster v. Black (1908), 78 Ohio St. 1, 81 N. E. 423, 125 Am. St. R. 679, 21 L. R. A. (N. S.) 52, 14 Ann. Cas. 877; Wilson v. Campbell (1896), 110 Mich. 580, 68 N. W. 278, 35 L. R. A. 544; Burnham v. Wilson (1911), 207 Mass. 378, 93 N. E. 704; Koen v. Miller (1912), 105 Ark. 152, 150 S. W. 411.

[68] See Dingley v. McDonald (1899), 124 Cal. 682, 56 Pac. 790; Quigley v. Mexico Bank (1883), 80 Mo. 289, 50 Am. Rep. 503; Moore v. Skyles (1905), 33 Mont. 135, 82 Pac. 799, 114 Am. St. R. 801, 3 L. R. A. (N. S.) 136.

[69] See Melvin v. Lamar Ins. Co. (1875), 80 Ill. 446, 22 Am. Rep. 199; Danziger v. Pittsfield Shoe Co. (1903), 204 Ill. 145, 68 N. E.

[70] See Powell v. Henry (1892), 96 Ala. 412, 11 So. 311; Hutchings v. Munger (1869), 41 N. Y. 155; Karcher v. Gans (1900), 13 S. Dak. 383, 83 N. W. 431, 79 Am. St. R. 893; Lawrence v. Johnson (1872), 64 Ill. 351.

534; Eaton v. Knowles (1886), 61 Mich. 625, 28 N. W. 740. No authority to release balance on receiving part, McHany v. Schenck (1878), 88 Ill. 357, or to release one joint debtor upon receiving security from the other. Cram v. Sickel (1897), 51 Neb. 828, 71 N. W. 724, 66 Am. St. R. 478.

No authority to release or waive liens, or release securities without payment of the debt: First Nat. Bank v. Farmers' Savings Bank (1922), — Iowa —, 187 N. W. 474; Porter v. Packers' Nat. Bank (1914), 95 Neb. 223, 145 N. W. 255.

[71] See Tootle v. Cook (1893), 4 Colo. App. 111, 35 Pac. 193, Goddard's Cas. 431; Halladay v. Underwood (1899), 90 Ill. App. 130.

[72] See Park v. Cross (1899), 76 Minn. 187, 78 N. W. 1107, 77 Am. St. R. 630.

[73] Authority to collect undoubtedly often is given under such circumstances as to show that the agent is expected to take partial payments on account if he cannot get it all; but there may also be cases in which to take part only would prejudice the principal. Compare Lowenstein v. Bresler (1895), 109 Ala. 326, 19 So. 860.

[74] See Joyce v. Duplessis (1860), 15 La. Ann. 242, 77 Am. Dec. 185.

Foreclosure: Mere authority to receive interest or principal on a note and mortgage would not justify a foreclosure of the mortgage if not paid. Burchard v. Hull (1898), 71 Minn. 430, 74 N. W. 163; Dexter v. Morrow (1899), 76 Minn. 413, 79 N. W. 394; White v. Madigan (1899), 78 Minn. 286, 80 N. W. 1125, though a known course of conduct, *i. e.*, a known practice of doing so, may justify it. Springfield Sav. Bank v. Kjaer (1901), 82 Minn. 180, 84 N. W. 752.

Employing Counsel: If the agent were in fact authorized to begin suit, he would ordinarily have implied authority to employ counsel. Ryan v. Tudor (1884), 31 Kan. 366, 2 Pac. 797.

[75] See Haynes v. Carpenter (1900), 86 Mo. App. 30.

[76] See Dawson v. Wombles

The fact that an agent authorized to collect money afterwards misappropriates it, will not affect the payer, if he has himself acted in good faith.[77]

§ 275. —— **What may be received in payment.**—An agent authorized to receive payment has no implied authority to receive anything but *money* in payment. He therefore may not accept goods, land, stocks, bills, drafts, bonds, or promissory notes, whether of the debtor, third persons, or himself.[78] He would have no implied authority to accept a check *as payment*, unless that were usual.[79] If he received it conditionally and got the money upon it, the money would constitute the payment.[80]

If he were authorized to receive a check in payment and has taken one payable to the order of his principal, he would ordinarily have no implied authority to endorse the check and get the money thereon.[81] If he was authorized to take a check to

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(1905), 111 Mo. App. 532, 86 S. W. 271.

[77] See Grant v. Humerick (1904), 123 Iowa 571, 94 N. W. 510.

[78] See Ward v. Smith (1868), 74 U. S. (7 Wall.) 447, 19 L. Ed. 207, Wambaugh's Cas. 339; Barker v. Greenwood (1837), 2 Younge & Col. 414, Goddard's Cas. 426; Dixon v. Guay (1900), 70 N. H. 161, 46 Atl. 456, Goddard's Cas. 428; Miller v. Edmonston (1846), 8 Blackf. (Ind.) 291, Goddard's Cas. 429; Cram v. Sickel (1897), 51 Neb. 828, 71 N. W. 724, 66 Am. St. R. 478.

The money received must either be that "which the law declares to be a legal tender, or which is by common consent considered and treated as money and passes as such at par."

As to Confederate money compare Fretz v. Stover (1874), 89 U. S. (22 Wall.) 198, 22 L. Ed. 769; with Hendry v. Benlisa (1896), 37 Fla. 609, 20 So. 800, 34 L. R. A. 283.

[79] See Hall v. Storrs (1858), 7 Wis. 253 (agent liable for loss caused by taking check); Harlan v. Ely (1886), 68 Cal. 522, 9 Pac. 947 (same); Pape v. Westacott [1894] 1 Q. B. 272 (same).

[80] See Griffin v. Erskine (1906), 131 Iowa 444, 109 N. W. 13, 9 Ann. Cas. 1193.

[81] See Jackson v. Nat. Bank (1893), 92 Tenn. 154, 20 S. W. 802, 18 L. R. A. 663, 36 Am. St. R. 81, Mechem's Cas. 415; McFadden v. Follrath (1911), 114 Minn. 85, 130 N. W. 542, 37 L. R. A. (N. S.) 201; Jackson Paper Co. v. Commer. Nat. Bank (1902), 199 Ill. 151, 65 N. E. 136, 93 Am. St. R. 113, 59 L. R. A. 657;

his own order as a means of getting the money, he might of course endorse it in his own name for that purpose, and if he received the money it would be a good payment.[82]

§ 276. Authority to make negotiable paper.—Authority to make or endorse negotiable paper is not to be lightly inferred. It may, of course, be expressly conferred, but it will rarely be implied from even very general words used in conferring authority to do some other act.[83] If sought to be upheld as an incident to an express authority, it will, as a rule, be implied only when its exercise is practically indispensable to the execution of that authority.[84]

And even when specially and expressly conferred, as in the case of a special agent, the authority is ordinarily subject to a very strict construction, and the agent can bind his principal only where he acts within the very limits of his authority.[85]

Graham v. U. S. Savings Inst. (1870), 46 Mo. 186, Goddard's Cas. 430; Pickle v. Muse (1889), 88 Tenn. 380, 12 S. W. 919, 17 Am. St. R. 900, 7 L. R. A. 93; Crahe v. Savings Bank (1920), 295 Ill. 375, 129 N. E. 120, 12 A. L. R. 92; Arcade Realty Co. v. Bank (1919), 180 Cal. 318, 181 Pac. 66, 12 A. L. R. 102; Coleman v. Bank (1919), 109 Wash. 80, 186 Pac. 275, 12 A. L. R. 108 and Note.

But where an agent operating in another State, and expected to deal for cash, received a check on a local bank to the order of his principal and endorsed it and received the money, it was held that the circumstances justified the conclusion that he was authorized to do so. Chamberlin Weatherstrip Co. v. Bank (1920), 107 Kan. 79, 190 Pac. 742, 12 A. L. R. 97. Compare Galbraith v. Weber (1910), 58 Wash. 132, 107 Pac. 1050, 28 L. R. A. (N. S.) 341.

[82] See Cohen v. O'Connor (1873), 5 Daly (N. Y.) 28, 8 Albany L. J. 189; Harbach v. Colvin (1887), 73 Iowa 638, 35 N. W. 663; Bridges v. Garrett (1870) L. R. 5 Com. Pl. 451.

[83] See Rossiter v. Rossiter (1832), 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; Brantley v. Southern Ins. Co. (1875), 53 Ala. 554, Goddard's Cas. 440.

[84] See Gardner v. Baillie (1796), 6 T. R. 591, Wambaugh's Cas. 260; Howard v. Baillie (1796), 2 H. Bl. 618, Wambaugh's Cas. 261; Bickford v. Menier (1887), 107 N. Y. 490, 14 N. E. 438, Mechem's Cas. 93; Jackson v. Nat'l Bank (1893), 92 Tenn. 154, 20 S. W. 802, 36 Am. St. R. 81, 18 L. R. A. 663, Mechem's Cas. 415; Exchange Bank v. Thrower (1903), 118 Ga. 433, 45 S. E. 316, Goddard's Cas. 433.

[85] See Helena Nat. Bank v. Rocky Mt. Tel. Co. (1898), 20

Variations in such matters as time, amount, rate of interest, place of payment, and the like, will, ordinarily, defeat recovery by any holder charged with notice of them.[86] But a special agent having discretion as to these matters might bind his principal although he exercised his discretion otherwise than precisely as he had been directed; and a general agent authorized to make or endorse notes might bind his principal even though he violated his private instructions in so doing.

§ 277. —— Authority to make or endorse negotiable instruments is, presumptively, to be exercised only in the principal's business and for his benefit; and if the agent diverted this authority to his own personal use and benefit,[87] or to the use and benefit of outsiders,[88] a taker of the paper who knew of and participated in this abuse could not recover.

Under a rule already referred to,[89] where the right to exercise the authority depends upon conditions peculiarly if not necessarily within the knowledge of the agent, one who takes in good faith in reliance upon the agent's representation as to these conditions may be protected even though that representation were untrue in fact.[90]

Mont. 379, 51 Pac. 829, 63 Am. St. R. 628.

[86] See Batty v. Carswell (1806), 2 Johns. (N. Y.) 48, Wambaugh's Cas. 266; King v. Sparks (1886), 77 Ga. 285, 1 S. E. 266, 4 Am. St. R. 85; Tate v. Evans (1841), 7 Mo. 419.

[87] See Camden Safe Dep. Co. v. Abbott (1882), 44 N. J. L. 257, Mechem's Cas. 376; Englehart v. Peoria Plow Co. (1897), 21 Neb. 41, 31 N. W. 391; Mechanics' Bank v. Schaumburg (1866), 38 Mo. 228; Stainback v. Read (1854), 11 Gratt. (Va.) 281, 62 Am. Dec. 648.

[88] See Brantley v. Southern L. Ins. Co. (1875), 53 Ala. 554, Goddard's Cas. 440; Boord v. Strauss (1897), 39 Fla. 381, 22 So. 713; Myers v. Walker (1898), 104 Ga. 316, 30 S. E. 842; Merchants' Nat. Bank v. Detroit (1888), 68 Mich. 620, 36 N. W. 696.

[89] See *ante* § 242, *et seq.*

[90] See North River Bank v. Aymar (1842), 3 Hill (N. Y.) 262, Wambaugh's Cas. 303; Huie v. Allen (1895), 87 Hun (N. Y.) 516, 34 N. Y. Supp. 577, 68 N. Y. St. Rep. 641, (aff'd 156 N. Y. 658, 50 N. E. 1118).

§ 278. —— **What acts justified.**—Here, as elsewhere, the act done must be the act authorized if it is to bind the principal. Authority to execute a note gives no authority to renew it[91] or to pay it when due.[92] Authority to execute a note does not justify drawing checks, and *vice versa.* Authority to draw a check upon a sum deposited does not justify drawing checks upon the principal's credit or issuing bills of exchange.[93] Authority to draw checks does not justify borrowing money.[94]

§ 279. **Authority to manage business.**—Authority to manage the principal's business is one which obviously must vary widely with the nature and extent of the business or enterprise to be managed. The power may be simply of the administrative sort, that is, to direct in pursuance of policies fixed by the principal, or it may be so wide as to itself include the fixing of policy as well as the executing of it. Presumptively in either case it will include authority to do all of the things which are necessary and proper to be done in carrying on the business in the usual and accustomed way and which the principal would usually do if he were managing the affair in person. Nevertheless the power of the principal is greater than the authority of a manager. The principal may change, expand or terminate the business, while the manager would ordinarily be expected to conduct it but not to alter or terminate it. A manager given complete charge of a business requiring the usual and ordinary servants or agents, may ordinarily employ them;[95] he may buy

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[91] See Ward v. Bank (1828), 7 T. B. Mon. (Ky.) 93.

[92] See Luning v. Wise (1883), 64 Cal. 410, 1 Pac. 495, 874.

[93] See Breed v. First Nat. Bank (1878), 4 Colo. 481; Bank of Deer Lodge v. Hope Mining Co. (1878), 3 Mont. 146, 35 Am. Rep. 458, Goddard's Cas. 435.

[94] See Mordhurst v. Boies (1867), 24 Iowa 99.

[95] See Jenkins S. S. Co. v. Preston (1911), 108 C. C. A. 473, 196 Fed. 609; King v. Seaboard Air Line R. Co. (1906), 140 N. Car. 433, 53 S. E. 237; Blowers v. Southern Ry. Co. (1906), 74 S. Car. 221, 54 S. E. 368; Merritt v. Huber (1908), 137 Iowa 135, 114 N. W. 627; Grand Pacific Hotel v. Pinkerton (1905), 217 Ill. 61, 75 N. E. 427; Davis v. Matthews (1896), 8 S. Dak. 300, 66 N. W. 456.

But he has no implied authority to employ for unusual purposes customary and necessary supplies;[96] he may decide incidental questions necessary to be decided in order to carry on;[97] if the purpose of the business is to produce and sell the product, he may sell the product in the usual way,[98] and decide upon the ordinary questions therein involved.

§ 280. —— But on the other hand, authority to manage a business, to which such an authority is not shown to be a usual incident, does not imply authority to make negotiable paper;[99] or to sell the business;[1] or to borrow money unless absolutely

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or on unusual or extraordinary terms. See Stephens v. Lumber Co. (1912), 160 N. Car. 107, 75 S. E. 933, 41 L. R. A. (N. S.) 1141; Thiel Detective Service Co. v. McClure (1906), 74 C. C. A. 122, 142 Fed. 952, 4 L. R. A. (N. S.) 843; Schlapbach v. Richmond R. Co. (1890), 35 S. Car. 517, 15 S. E. 241.

[96] See Beecher v. Venn (1877), 35 Mich. 466, Goddard's Cas. 352; Louisville Coffin Co. v. Stokes (1884), 78 Ala. 372; Wallis Tobacco Co. v. Jackson (1892), 99 Ala. 460, 13 So. 120; Pacific Biscuit Co. v. Dugger (1901), 40 Oreg. 302, 67 Pac. 32; Witcher v. Gibson (1900), 15 Colo. App. 163, 61 Pac. 192.

[97] See Michaud v. MacGregor (1895), 61 Minn. 198, 63 N. W. 479; Tice v. Russell (1890), 43 Minn. 66, 44 N. W. 886; Indianapolis Rolling Mill v. St. Louis, etc., Ry. Co. (1886), 120 U. S. 256, 7 Sup. Ct. 542, 30 L. Ed. 639; Henderson Bridge Co. v. McGrath (1889), 134 U. S. 260, 10 Sup. Ct. 730, 33 L. Ed. 934.

[98] See Silver Mining Co. v. Smelting Co. (1891), 16 Colo. 118, 26 Pac. 326.

[99] See New York Iron Mine v. First Nat. Bank (1878), 39 Mich. 644, Mechem's Cas. 423; Perkins v. Boothby (1880), 71 Me. 91; Jackson Paper Co. v. Commercial Nat. Bank (1902), 199 Ill. 151, 65 N. E. 136, 93 Am. St. R. 113, 59 L. R. A. 657; Helena Nat. Bank v. Rocky Mt. Tel. Co. (1898), 20 Mont. 379, 51 Pac. 829, 63 Am. St. R. 628.

Compare Glidden Varnish Co. v. Interstate Bank (1895), 16 C. C. A. 534, 69 Fed. 912.

No authority to make accomodation notes: Gulick v. Grover (1868), 33 N. J. L. 463, 97 Am. Dec. 728.

[1] See Vescelius v. Martin (1888), 11 Colo. 391, 18 Pac. 338, Mechem's Cas. 422; Dearing v. Lightfoot (1849), 16 Ala. 28.

None to transfer the business and property or the bulk of it to pay debts, Claflin v. Continental Works (1890), 85 Ga. 27, 11 S. E. 721, or to make general assignment for benefit of creditors. Gouldy v. Metcalf (1889), 75 Tex. 455, 12 S. W. 830, 16 Am. St. R. 912. None to embark on a different business. Campbell v. Hastings (1874), 29 Ark. 512.

necessary;[2] or to pledge or mortgage the principal's property;[3] or to make any contract not within the usual scope of the business.[4]

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[2] See Hawtayne v. Bourne (1841), 7 M. & W. 595, Wambaugh's Cas. 301; Exchange Bank v. Thrower (1903), 118 Ga. 433, 45 S. E. 316, Goddard's Cas. 433; Bickford v. Menier (1887), 107 N. Y. 490, 14 N. E. 438, Mechem's Cas. 93; Consolidated Nat. Bank v. Steamship Co. (1892), 95 Cal. 1, 30 Pac. 96, 29 Am. St. R. 85.

[3] See Despatch Line v. Bellamy Mfg. Co. (1841), 12 N. H. 205, 37 Am. Dec. 203; Edgerly v. Cover (1898), 106 Iowa 670, 77 N. W. 328; Golinsky v. Allison (1896), 114 Cal. 458, 46 Pac. 295; First Nat. Bank v. Kirkby (1901), 43 Fla. 376, 32 So. 881.

[4] See Brockway v. Mullin (1884), 46 N. J. L. 448, 50 Am. Rep. 442, Mechem's Cas. 419 (manager of hotel no authority to agree that livery supplied to guests might be charged to the hotel and that hotel would be responsible for safe return of horses and vehicles so supplied).

Furnishing Medical Aid, etc.—Whether the implied authority of the general manager of a railroad, factory or mine extends to procuring medical aid or nursing for passengers or employees injured in the operation of the enterprise, has been much disputed. It has often been conceded to the general manager of a railroad, though denied as to the manager of a mine or factory. It does not usually, in the case of railroads belong to lesser managers like station agents, yard masters, conductors, and the like, unless, in some States, there is a sudden emergency and he is the highest representative upon the ground. See Professor H. B. Hutchins, in 2 Michigan Law Review 1; Marquette, etc., R. Co. v. Taft (1873), 28 Mich. 289 (court equally divided as to authority of general superintendent); Cincinnati, etc., R. Co. v. Davis (1890), 126 Ind. 99, 25 N. E. 878, 9 L. R. A. 503 (general superintendent has authority); Union Pac. Ry. Co. v. Winterbotham (1893), 52 Kan. 433, 34 Pac. 1052 (division superintendent has authority); Terre Haute, etc., R. Co. v. McMurray (1884), 98 Ind. 358, 49 Am. Rep. 752 (conductor has authority in emergency); Peninsular R. Co. v. Gary (1886), 22 Fla. 356, 1 Am. St. R. 194 (*contra*). Holmes v. McAllister (1906), 123 Mich. 493, 82 N. W. 220, 48 L. R. A. 396 (manager of laundry has not); Ward v. Samuels (1915), 37 R. I. 438, 93 Atl. 649, Ann. Cas. 1918A, 783, and Note (superintendent of mercantile company has not); Spelman v. Gold Coin Mining Co. (1901), 26 Mont. 76, 66 Pac. 597, 91 Am. St. R. 402, 55 L. R. A. 640 (manager of mine has not); Mt. Wilson Mining Co. v. Burbridge (1898), 11 Colo. App. 487, 53 Pac. 826 (*contra*). See also Cairo, etc., Ry. Co. v. Mahoney (1876), 82 Ill.

§ 281. **Authority to make declarations, representations or admissions.**—Authority to make statements, representations, or admissions, like the other authorities already considered, may arise expressly or by implication. The agent sent out to make a contract or a sale has thereby usually express authority to use the words and make the utterances which are required in executing that authority. An advertising agent may have express authority to make the statements and representations which are involved in the act of advertising. An agent, authorized to invite offers or proposals, may have express authority to state the basis upon which they are invited; and the like. In a great variety of cases, the use of words will be the very act authorized.

A similar situation may be presented where the principal expressly refers one person to another for information; the person referred to would thereby have implied, if not express, authority to give information upon the subject referred to him.[5]

But the authority need not be express. It may be implied from the authority to do an act, to the doing of which the representations or declarations are naturally and ordinarily incident. If a principal, carrying on an extensive business,

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73, 25 Am. Rep. 299; Arkansas, etc., Ry. Co. v. Loughridge (1898), 65 Ark. 300, 45 S. W. 907.

Gratuitous Acts—Where a business is being carried on for profit, it is not usually within the implied or the apparent authority of an agent engaged in it, to undertake to do the acts involved gratuitously or merely for the accommodation of third persons. Thus an agent in charge of an express office has no implied or apparent authority to bind the company by taking in goods, not for carriage now or later, but to be stored or kept for the accommodation of a customer: American Ry. Express Co. v. Wright (1922), 128 Miss. 593, 91 So. 342, 23 A. L. R. 127, and note (customer's wraps).

Deposits of money—Implied authority of manager to receive sums of money on deposit. Peltola v. Publishing Society (1920), 113 Wash. 283, 193 Pac. 691, 20 A. L. R. 374.

[5] See Chadsey v. Green (1856), 24 Conn. 562; Over v. Schiffling (1885), 102 Ind. 191, 26 N. E. 91; Chapman v. Twitchell (1853), 37 Me. 59, 58 Am. Dec. 773; Thayer v. Davis (1889), 75 Wis. 205, 49 N. W. 902.

establishes an "information office," and expressly or by implication refers interested persons to it, the agent placed in charge would have implied, if not express, authority to answer the inquiries and give the information naturally and reasonably to be expected at such a place.

If an enterprise is put in charge of a manager, a general superintendent, an overseer, or a foreman, authority to make the decisions, answer the inquiries, and give the directions, which are naturally and ordinarily incident to such a position, may be implied.[6] The cashier of a bank, for illustration, has frequently been held, by reason of his position, to have implied authority to answer the inquiries and give the information, about the matters under his charge, which may naturally and reasonably be expected to demand attention.[7] It is unnecessary to multiply such instances, as the situation is familiar, and the general inferences are not difficult to draw.

§ 281a. —— The limitations which rest upon such an authority are also usually obvious. The case must be one fairly and reasonably incident to the authority conferred, and the statements made and the information given must be germane to the subject-matter placed in the agent's charge. If I wish to ascertain whether my trunk has arrived at, or left, a particular railway station, I may properly ask the baggage-master at that station, but not the baggage-master at another and different station.[8] I might not, ordinarily, properly expect to get such information from the ticket agent or the freight agent, unless the same person served in both capacities.[9] If I had notice that the person of whom I might otherwise inquire, was not the one appointed to give the information in that particular case, I could not ordinarily ignore such notice.

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[6] See Adams Express Co. v. Harris (1889), 120 Ind. 73, 21 N. E. 340, 16 Am. St. R. 315, 7 L. R. A. 214; McGenness v. Adriatic Mills (1874), 116 Mass. 177; McCammon v. Detroit, etc., R. Co. (1887), 66 Mich. 442, 33 N. W. 728; Jacksonville, etc., R. Co. v. Land Co. (1891), 27 Fla. 1, 9 So. 661, 17 L. R. A. 33.

[7] See Xenia Bank v. Stewart (1884), 114 U. S. 224, 5 S. Ct. 845, 29 L. Ed. 101; Simmons Hardware Co. v. Greenwood Bank (1893), 41 S. Car. 177, 19 S. E. 502, 44 Am. St. R. 700.

[8] See Morse v. Railroad Co. (1856), 72 Mass. (6 Gray) 450; Gott v. Dinsmore (1872), 111 Mass. 45; Baltimore, etc., R. Co. v. Campbell (1881), 36 Ohio St. 647, 38 Am. Rep. 617.

The inquiries made and the answers given must ordinarily relate to matters respecting the principal's affairs, and not to the affairs of other persons with whom he has no concern. Thus, while the cashier of a bank might be deemed to have authority to give information relating to the business of the bank, he would not ordinarily have implied authority to bind the bank by information given respecting people living in the community.[10]

So, obviously, the inquiries made and the answers given must relate to matters within the authority of the agent who makes the answers, and not of some other agent even of the same principal.

Where the authority is deemed to exist because it is incident to an act authorized, it would ordinarily not exist independently and apart from that act. It could therefore only be properly exercised while that act was being done and as a part of it. Statements made either entirely before that act was begun, or after it had been fully performed, could not be justified as a part of it.[11]

§ 281b. —— If I deal with the proper agent, in a proper case, the principal would ordinarily be liable if his agent heedlessly, negligently, or even wilfully, gave me improper or untrue information or replies, which naturally and directly misled me to my injury where I had used reasonable care for my own protection. The fact that the principal had directed or expected that only true and proper responses or statements should be made or given, would not ordinarily exonerate him.

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[9] See Taylor v. Chicago, etc., Ry. Co. (1874), 74 Ill. 86.

[10] See Goodbar v. Bank (1890), 78 Tex. 461, 14 S. W. 851.

[11] This subject is more fully considered in Chapter XV, *post*. See also Lee v. Bank (1899), 108 Iowa 716, 78 N. W. 692; Franklin Bank v. Steward (1853), 37 Me. 519.

CHAPTER XI.

OF THE EXECUTION OF THE AUTHORITY.

§282. In general.
283. Excessive or defective execution.
284-287. Execution of written instruments.
288. Execution of sealed instruments.
289-291. Execution of negotiable instruments.
292. Execution of other simple contracts.
293-295. Parol evidence to explain.

§ 282. **In general.**—It is the general duty of the agent to execute the authority in the name, and for the benefit of the principal, and to confine his acts within the scope of the authority conferred upon him.

It is also especially to the interest of the agent to execute the authority so as to bind the principal and not to bind himself.

To disclose his principal, to act in the principal's name, and to keep within his authority, are ordinarily the essentials to this end.

§ 283. **Excessive or defective execution.**—The execution of the authority in a given case may fail either because the agent has neglected to fully exercise his authority, or because he has exceeded it. A deficient execution will ordinarily not bind the principal, though it may so operate as to bind the agent personally. An excessive execution will not necessarily be defective. If there has been a complete execution of the authority and the excess can be distinguished and disregarded, the authorized portion may be given effect.[1]

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[1] Thus in Thomas v. Joslin (1883), 30 Minn. 388, 15 N. W. 675, Mechem's Cas. 427, the court said that a superfluous seal added could be rejected as surplusage. It also quoted from Alexander v. Alexander (1755), 2 Ves. Sr. 640, the rule that "where there is a complete execution of a power, and something *ex abundanti* added

The execution of the authority may also fail because the agent has attempted something wholly beyond the power conferred, or has undertaken to do that which a proper construction of his authority will not justify.

§ 284. **Execution of written instruments.**—It is in the execution of written instruments that question is most likely to arise, because such instruments show on their face precisely what was done and are less open to explanation by the surrounding circumstances. It may often happen, therefore, that the agent may, through inadvertence, ignorance or mistake, so

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which is improper, there the execution shall be good, and only the excess void; but where there is not a complete execution of a power, where the boundaries between the excess and the execution are not distinguishable, it will be bad."

In Baines v. Ewing (1866), 4 Hurl. & C. 511, Wambaugh's Cas. 334, where an agent was authorized to underwrite an insurance policy to the extent of £100, and wrote for £150, it was held that there could be no recovery on the policy even to the extent of £100. Bramwell, B. said *arguendo*: "I can well understand that if a man is authorized to make a feoffment of one acre, and he makes a feoffment of two, it is good for the one and void as to the other; but a contract is an entire thing and indivisible." (Compare Chouteau v. Allen (1879), 70 Mo. 290.)

In Wilson v. Beardsley (1886), 20 Neb. 449, 30 N. W. 529, Goddard's Cas. 452, where the principal had written a letter authorizing his agent to draw upon him for $75, and the agent altered it to $175, and drew $150, it was held that an indorser had a claim for reimbursement for $75. The court said that it was the same as though he had drawn two drafts for $75 each. The first one would have been good. But is it the same?

In Johnson v. Blasdale (1843), 1 Smedes & M. (9 Miss.), 17, 40 Am. Dec. 85, where a note was drawn and endorsed with the amount left in blank and an agent was authorized to fill it up with the amount of goods which he should buy for his principal, and the agent filled it for a sum, which, as the payee knew, represented the amount bought for his principal and an additional amount, it was held that the payee could recover of the endorser up to the amount authorized.

Of course, where the limitation is merely in the nature of a secret instruction, the principal may be bound though the limit is exceeded. See Brocklesby v. Building Society [1895], A. C. 173.

execute as to bind, not his principal, but himself, or no one, even when his desire and intention were to bind the principal.

To bind the principal, as a general rule, the instrument should be made in the name of the principal and not in the name of the agent; the promises or undertakings should be made in the name of the principal; and the signature should be that of the principal, though affixed by the hand of the agent.

It is, of course, true, as will be seen hereafter, that the principal may sometimes enforce or be held upon contracts in writing, if neither negotiable nor under seal, although not complying with this rule,[2] but even in these cases conformity with the rule would have been advantageous.

§ 285. —— If William White is principal and Benjamin Black is the agent, the proper signature would be: *William White, by Benjamin Black, his agent,* (or, *his attorney in fact*). The words *his agent* or *his attorney in fact*, though proper and desirable, might be omitted without destroying the effect.[3] Even to omit the words *by Benjamin Black,* and to simply sign the principal's name would not be fatally defective, though it is an undesirable method to pursue.[4]

§ 286. —— On the other hand, where the body of the instrument reads *I* promise, *I* sell, etc., to sign merely thus: *Benjamin Black, Agent,* is clearly insufficient to bind the principal, but would ordinarily bind the agent.[5] So of a signature thus: *Benjamin Black, Agent of William White.* Here the expression *Agent,* or *Agent of William White,* simply serves, it is

[2] See *post* § 461; § 585.

[3] Thus *William White, by Benjamin Black,* would be good.

[4] It is not necessary that an authorized signing of the principal's name by the agent shall be accompanied by words showing that it was signed by an agent. It is desirable but not necessary. It may be shown to have been so signed. See First Nat. Bank v. Gay (1876), 63 Mo. 33, 21 Am. Rep. 430; Forsyth v. Day (1856), 41 Me. 382. Compare Wood v. Goodridge (1850), 6 Cush. (60 Mass.) 117, 52 Am. Dec. 771.

[5] See Stinson v Lee (1890), 68 Miss. 113, 8 So. 272, 24 Am. St. R. 257, 9 L. R. A. 830.

held, to show who Benjamin Black is; it is, in the current phrase, simply descriptive of the person who signs,—*descriptio personae.* The result is the same where the addition is *president, treasurer, trustee,* etc.[6] *For William White, Benjamin Black* or *Benjamin Black for William White,* usually binds William White.[7] *Benjamin Black, Agent for William White,* has been both approved[8] and disapproved[9] as a signature to bind William White, but the weight of authority is that it does bind him. *William White Manufacturing Co., by Benjamin Black, President,* clearly binds the company; if the word *by* or *per* be omitted the result would seem to be the same,[10] but a few courts treat this as possibly two signatures, one of which binds Benjamin Black personally.[11]

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[6] See Hobson v. Hassett (1888), 76 Cal. 203, 18 Pac. 320, 9 Am. St. R. 193, Mechem's Cas. 442 (Note reading "We promise to pay," signed "A. Hassett, President," binds Hassett); Price v. Taylor (1860), 5 H. & N. 540, Wambaugh's Cas. 604; Tucker Mfg. Co. v. Fairbanks (1867), 98 Mass. 101, Wambaugh's Cas. 614; Sturdivant v. Hull (1871), 59 Me. 172, 8 Am. Rep. 409, Wambaugh's Cas. 619; Western Pub. House v. Murdick (1893), 4 S. Dak. 207, 56 N. W. 120, 21 L. R. A. 671; Pratt v. Beaupre (1868), 13 Minn. 187, Goddard's Cas. 463.

[7] See Long v. Colburn (1814), 11 Mass. 97, 6 Am. Dec. 160; Wheelock v. Winslow (1863), 15 Iowa 464; Roney v. Winter (1861), 37 Ala. 277.

[8] See Dolan v. Alley (1891), 153 Mass. 380, 26 N. E. 989, (citing many cases). See also Ballou v. Talbot (1820), 16 Mass. 461, 8 Am. Dec. 146, Wambaugh's Cas. 494.

[9] See Tannatt v. National Bank (1871), 1 Colo. 278, 9 Am. Rep. 156; Peterson v. Homan (1890), 44 Minn. 166, 46 N. W. 303, 20 Am. St. R. 564; Dawson v. Cotton (1855), 26 Ala. 591.

[10] Thus a note reading "We promise to pay," etc., and signed "San Pedro Mining and Milling Company, F. Kraus, President" binds the company and not Kraus: Liebscher v. Kraus (1889), 74 Wis. 387, 43 N. W. 166, 17 Am. St. R. 171, 5 L. R. A. 496, Mechem's Cas. 448, Goddard's Cas. 474, Wambaugh's Cas. 624.

To same effect: Reeve v. First National Bank (1892), 54 N. J. L. 208, 23 Atl. 853, 33 Am. St. R. 675, 16 L. R. A. 143, Mechem's Cas. 446. Castle v. Belfast Foundry Co. (1881), 72 Me. 167; Falk v. Moebs (1888), 127 U. S. 597, 8 Sup. Ct. 1319, 32 L. Ed. 266.

[11] See Bean v. Mining Co. (1885), 66 Cal. 451, 6 Pac. 86, 56 Am. Rep. 106.

§ 287. —— Language in the body of the instrument may affect the significance of the signature. Thus if a note reads, "I, as agent of William White, promise to pay," etc., and is signed *Benjamin Black, Agent*, the latter would not be personally bound.[12] The same result would be reached where the promise is "I, for William White, promise," etc., or "I, in behalf of" or "on account of William White, promise," etc., and is signed *Benjamin Black, Agent.*[13]

If the promise be in this form, "William White promises to pay," etc., and is signed *Benjamin Black, Agent*, it would seem to be clearly the promise of White,[14] but the courts have not always so regarded it, some of them deeming it to be not more than ambiguous.[15]

§ 288. Execution of sealed instruments.—These considerations apply with special force to instruments under seal, because, of all the kinds of contracts in writing, those under seal are the most inflexible and least open to explanation by outside circumstances. To bind the principal upon instruments under seal, the instrument must be so executed as to show upon its face that it is the deed of the principal; that the covenants are his; that he makes the grants; and that the signature and seal are his, though affixed by the agent. If the grants and covenants are those of the agent, the mere fact that he describes himself as "agent" will not relieve him from personal liability, or make the act the principal's.[16]

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[12] See Blanchard v. Kaull (1872), 44 Cal. 440; Leach v. Blow (1847), 8 Smedes & M. (Miss.) 221; Barlow v. Congregational Society (1864), 8 Allen (Mass.) 460.

[13] See Andrews v. Estes (1834), 11 Me. 267, 26 Am. Dec. 521; Lindus v. Melrose (1857), 2 H. & Norm. 293, 3 *id.* 177.

[14] See Mott v. Hicks (1823), 1 Cow. (N. Y.) 513, 13 Am. Dec. 550.

[15] See Frankland v. Johnson (1893), 147 Ill. 520, 35 N. E. 480, 37 Am. St. R. 234; Wiers v. Treese (1911), 27 Okla. 774, 117 Pac. 182; Day v. Ramsdell (1892), 90 Iowa 731, 52 N. W. 208, 57 N. W. 630.

[16] See McClure v. Herring (1899), 70 Mo. 18, 35 Am. Rep. 404, Mechem's Cas. 429; Hubbard v. Dry Goods Co. (1908), 209 Mo. 495, 108 S. W. 15, 123 Am. St. R. 488; Elwell v. Shaw (1819), 16 Mass. 42, 8 Am. Dec. 126; Shanks v. Lancaster (1848), 5 Gratt.

This rule has been changed by statute in a number of States. These statutes, though not uniform in language, in substance provide that the fact that the agent may grant, etc., in his own name, or informally appear to make himself the party, shall not prevent the deed from taking effect as the deed of his principal, where his authority to bind the principal is shown, and he appears to have acted in pursuance and execution of that authority.

In a number of States, also, seals and their consequences, have been expressly abolished, thus giving greater freedom in showing the real intention of the parties.

§ 289. **Execution of negotiable instruments.**—Negotiable instruments, such as promissory notes and bills of exchange, occupy a peculiar place in our law. They are instruments of commerce and are designed to circulate freely in the transaction of business. It is highly important that they shall be clear, definite and unambiguous, and shall show upon their face who are the parties upon whose responsibility they rely. In the execution of negotiable paper, therefore, the rule is very strict that in order to bind the principal the paper shall show upon its face who the principal is, that it is his promise, and that the signature is his, though made by the hand of his agent. It is not sufficient that the principal be named in the body of the instrument only unless it also appears that the promise is his and that the agent signs for him. Where the principal is not thus manifested, the agent will be personally liable although

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(Va.) 110, 50 Am. Dec. 108; Knight v. Clark (1886), 48 N. J. L. 22, 2 Atl. 780, 57 Am. Rep. 534, Mechem's Cas. 434; Clarke v. Courtney (1831), 30 U. S. (5 Pet.) 319, 8 L. Ed. 140, Goddard's Cas. 453; Wilks v. Back (1802), 2 East 142, Wambaugh's Cas. 583; Taft v. Brewster (1812), 9 Johns. (N. Y.), 334, 6 Am. Dec. 280, Wambaugh's Cas. 585; Stinchfield v. Little (1821), 1 Me. 231, 10 Am. Dec. 65; Hopkins v. Mehaffy (1824), 11 Serg. & R. (Pa.) 126, Wambaugh's Cas. 590; Brinley v. Mann (1848), 2 Cush. (Mass.) 337, 48 Am. Dec. 669, Wambaugh's Cas. 593; Northwestern Distilling Co. v. Brant (1873), 69 Ill. 65, 18 Am. Rep. 631, Wambaugh's Cas. 596; Bradstreet v. Baker (1884), 14 R. I. 546, Wambaugh's Cas. 598.

he describes himself as "agent," "trustee," "president," and the like.[17]

§ 290. —— The Negotiable Instruments Act, which has now been adopted in about forty of our States, provides: "Where the instrument contains, or a person adds to his signature, words indicating that he signs for, or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability."[18] The first part of this provision is rather obscure, but the latter part of it is an enactment of the familiar rule as to *descriptio personae.*

§ 291. —— In a number of cases, printed headings on the paper, the impression of a corporate seal, and the like, suggesting the name of a possible principal have, when coupled with titles or descriptions appropriate to the character of one who acts as agent for such a principal, been held to indicate sufficiently that the paper was made on his account.[19]

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[17] See Hobson v. Hassett (1888), 76 Cal. 203, 18 Pac. 320, 9 Am. St. R. 193, Mechem's Cas. 442; Reeve v. Bank (1892), 54 N. J. L. 208, 23 Atl. 853, 33 Am. St. R. 675, 16 L. R. A. 143, Mechem's Cas. 446; Liebscher v. Kraus (1889), 74 Wis. 387, 43 N. W. 166, 17 Am. St. R. 171, 5 L. R. A. 496, Mechem's Cas. 448; Stinson v. Lee (1890), 68 Miss. 113, 8 So. 272, 24 Am. St. R. 257, 9 L. R. A. 830; Miller v. Roach (1889), 150 Mass. 140, 22 N. E. 634, 6 L. R. A. 71; Mathews v. Dubuque Mattress Co. (1893), 87 Iowa 246, 54 N. W. 225, 19 L. R. A. 676; McKensey v. Edwards (1889), 88 Ky. 272, 10 S. W. 815, 10 Ky. L. Rep. 854, 21 Am. St. R. 339, 3 L. R. A. 397; McCandless v. Belle Plaine Canning Co. (1889), 78 Iowa 161, 42 N. W. 635, 16 Am. St. R. 429, 4 L. R. A. 396; Merchants Bank v. Central Bank (1846), 1 Ga. 418, 44 Am. Dec. 665, Goddard's Cas. 460; Sturdivant v. Hull (1871), 59 Me. 172, 8 Am. Rep. 409.

[18] Sec. 20.

[19] Thus see Miller v. Roach, *supra;* Carpenter v. Farnsworth (1871), 106 Mass. 561, 8 Am. Rep. 360; Guthrie v. Imbrie (1885), 12 Oreg. 182, 6 Pac. 664, 53 Am. Rep. 331; Scanlan v. Keith (1882), 102 Ill. 634, 40 Am. Rep. 624; Hitchcock v. Buchanan (1881),

§ 292. **Execution of other simple contracts.**—In the case of other written contracts, the peculiar rules applicable to sealed instruments and negotiable paper do not apply; and while it is true that parol evidence may not be admitted to contradict or alter the writing, more regard is paid to the intention of the parties, and if that is clear, and can be given effect consistently with the terms of the instrument, it will usually control.[20]

§ 293. **Parol evidence to explain.**—In attempting to determine the liability of the parties to an instrument in writing executed by an agent, the question constantly arises whether parol evidence may be received to show who was intended to be the party bound. Upon this question the cases seem to be in hopeless conflict. Something depends upon the nature of the contract. In the case of instruments under seal, the rule is that only those appearing on the face of the instrument as the parties to it can be bound, or can enforce the contract.[21]

Therefore if the agent is the party to it, he can not be exonerated, nor can the principal be charged, by the use of parol evidence.

§ 294. —— In the case of negotiable instruments also strict rules are usually applied. If the promise is clearly the promise of the principal or of the agent, that party can not ordinarily be released, or the other one charged, upon parol evidence of intention.[22]

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105 U. S. 416, 26 L. Ed. 1078.

Compare Casco Nat. Bank v. Clark (1893), 139 N. Y. 307, 34 N. E. 908, 36 Am. St. R. 705.

[20] See Whitney v. Wyman (1879), 101 U. S. 392, 25 L. Ed. 1050, Mechem's Cas. 452; Brown v. Bradlee (1892), 156 Mass. 28, 30 N. E. 85, 32 Am. St. R. 430, 15 L. R. A. 509, Mechem's Cas. 454; Frambach v. Frank (1905), 33 Colo. 529, 81 Pac. 247, Goddard's Cas. 456.

[21] See Briggs v. Partridge (1876), 64 N. Y. 357, 21 Am. Rep. 617, Mechem's Cas. 436; Borcherling v. Katz (1883), 37 N. J. Eq. 150, Wambaugh's Cas. 647.

Compare Barbre v. Goodall (1896), 28 Oreg. 465, 38 Pac. 67, 43 Pac. 378, Goddard's Cas. 466, where a different result was reached on the ground that the seal was not essential.

[22] See Brown v. Parker (1863), 89 Mass. (7 Allen) 337; Sparks

But if the instrument contains words indicating the existence of a principal and the action is between the original parties, parol evidence may, it is believed, be received to show that it was the intention to charge the principal; and so it may be where the paper is on its face ambiguous and the action is between the original parties.[23]

Where the action is brought by a transferee, and the paper bears on its face some reference to a principal, parol evidence of intention to bind the principal may be received if the transferee is not a holder in due course.[24] If he is such a holder, it could only be received where the paper on its face contained such expressions or was so ambiguous as to fairly put a reasonably prudent man upon his guard.[25]

§ 295. —— In the case of other written contracts, the rule goes further, and while an unambiguous contract may not be contradicted by parol evidence, it may be shown in a doubtful case who was the person intended to be bound. And even where the promise on its face is clearly that of the agent, parol evidence is often admissible, as will be seen, to charge an undisclosed principal—that is, to show that he *also* is liable—though, not to discharge the agent. In such a case (the instrument not being negotiable or under seal) the other party may hold either the principal or the agent at his option.[26]

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v. Despatch Transfer Co. (1891), 104 Mo. 531, 15 S. W. 417, 12 L. R. A. 714, 24 Am. St. R. 351; New York L. Ins. Co. v. Martindale (1907), 75 Kan. 142, 88 Pac. 559, 121 Am. St. R. 362, 21 L. R. A. (N. S.) 1045, 12 Ann. Cas. 677.

[23] See Keidan v. Winegar (1893), 95 Mich. 430, 54 N. W. 901, 20 L. R. A. 705, Goddard's Cas. 471; Janes v. Citizens Bank (1900), 9 Okla. 546, 60 Pac. 290; Knippenberg v. Greenwood Min. Co. (1909), 39 Mont. 11, 101 Pac. 159.

[24] See Metcalf v. Williams (1881), 104 U. S. 93, 26 L. Ed. 665.

[25] See Metcalf v. Williams, *supra;* Davis v. Henderson (1853), 25 Miss. 549, 59 Am. Dec. 229; Mott v. Hicks (1823), 1 Cow. (N. Y.) 513, 13 Am. Dec. 550.

[26] See Higgins v. Senior (1841), 8 Mees. & Wels. 834, Mechem's Cas. 456, Goddard's Cas. 464, Wambaugh's Cas. 554; Huntington v. Knox (1851), 61 Mass. (7 Cush.) 371, Mechem's Cas. 587, Wambaugh's Cas. 634; Bulwinkle v. Cramer (1887), 27 S. Car. 376, 3 S. E. 776, 13 Am. St. R. 645. See also *post* § 465.

CHAPTER XII.

OF THE DUTIES AND LIABILITIES OF THE AGENT TO THE PRINCIPAL.

§296. In general.

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298, 299. Incapacity resulting—May not be agent of both parties.
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301, 302. —— May not deal with himself.
303. —— May not give his time or efforts to competing interests.
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§ 296. In general.—It is not possible to consider here every possible duty which the agent may owe to his principal, but the most important duties may be briefly dealt with, and the principles given will suggest the rules which will govern other cases.

1. *To be Loyal to his Trust.*

§ 297. Agent's duty of loyalty—In general.—It is the duty of the agent to conduct himself with the utmost loyalty and fidelity to the interests of his principal, and not to place himself or voluntarily permit himself to be placed in a position where his own interests or those of any other person whom he has undertaken to represent may conflict with the interests of his principal.

When the principal employs an agent, the law presumes that he does so in order to secure to himself the benefits of the agent's skill, experience or discretion, and to reap the fruits of the performance of the undertaking. The law presumes that he expects—and it gives him the right to expect—that the agent so employed will endeavor to further the principal's interests, and will use his powers for the principal's benefit. If, then, instead of serving the principal, the agent is seeking to serve himself, or some other person—if, instead of promoting his principal's interests, the agent is endeavoring to promote his own or some other person's interest at the expense of the principal's—the fundamental considerations underlying the existence of the relation will be defeated. This the law constantly aims to prevent.[1]

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[1] See, in general, People v. Township Board (1863), 11 Mich. 222; Tisdale v. Tisdale (1855), 2 Sneed (Tenn.) 596, 64 Am. Dec. 775; Porter v. Woodruff (1882), 36 N. J. Eq. 174; Levy v. Spencer

The rule, however, is one based upon the presumed intention of the principal and is designed to protect his interests. The principal may therefore waive the benefit of the rule so far as he is concerned, if he does so with full knowledge of the facts. In the absence of such a waiver, the rule is absolute.

§ 298. Incapacity resulting—May not be agent of both parties.—In order to secure the performance of this duty of the agent and to remove as far as possible all temptation and opportunity to violate it, the law positively forbids the agent's doing many acts which might otherwise seem harmless. Proof of actual injury to the principal is not ordinarily required. The law judges of these cases rather by the tendency of similar acts, and will often strike down a transaction even though it could be shown that nothing improper was done in that case or intended to be done, if its general character brings it within the forbidden class. Consequently, as has been already seen, the law does not ordinarily permit a person to assume to become an agent where he already has in the same transaction such an interest, either of his own or as agent for some other person, as may prevent his acting fairly toward his principal. The law recognizes that "no man can serve two masters" and give to each of them his undivided allegiance and support.

§ 299. —— Where, however, the principal is fully advised of the adverse interest, and is given an opportunity to protect himself and to refuse to be represented by an agent who can not give him undivided attention, and he still is willing to employ the agent, he may do so; and if he does, the law holds

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(1893), 18 Colo. 532, 33 Pac. 415, 36 Am. St. Rep. 303; Hofflin v. Moss (1895), 67 Fed. Rep. 440, 32 U. S. App. 200, 14 C. C. A. 459; Ramspeck v. Pattillo (1898), 104 Ga. 772, 30 S. E. 962, 69 Am. St. R. 197, 42 L. R. A. 197; Wildberger v. Hartford Fire Ins. Co. (1894), 72 Miss. 338, 17 So. 282, 48 Am. St. R. 558, 28 L. R. A. 220; Lum v. McEwen (1894), 56 Minn. 278, 57 N. W. 662, Goddard's Cas. 506; Jansen v. Williams (1893), 36 Neb. 869, 55 N. W. 279, 20 L. R. A. 207, Goddard's Cas. 508; Everhart v. Searle (1872), 71 Pa. 256, Goddard's Cas. 514.

that he has waived the benefit of the rule, so far as he is concerned.

If, however, there was already a principal on the other side represented by the agent in question, the willingness of the second principal to accept him would not be conclusive of all the questions which might arise. If I knowingly induce or permit the agent of the other party to the transaction to enter into my service, I would ordinarily be doing that other party an injury. Although I might not complain, he might. Transactions entered into through the common agent, while the other principal was ignorant of and not consenting to such double agency, could ordinarily be set aside by him, and I could claim no benefit through them. The guilty agent also would be implicated, and could ordinarily recover no compensation from either principal: Not from the first principal, because he had betrayed him; nor could he ordinarily recover from me, because both he and I were parties to an illegal contract. Even if I were innocent he would be guilty.[2]

Except with the full knowledge and consent of both principals, therefore, a person who is already agent of one party may not ordinarily undertake to act as agent of the other also in any case wherein, by reason of the confidence reposed or the judgment, discretion, or protective devotion required to be exercised, there may be a conflict in the performance of the duties which he has undertaken to each.

§ 300. —— Exceptions—Middlemen, etc.—While however the above rule is abundantly established, there may be cases wherein, by reason of differences in the circumstances, it does not apply. If his duties to each do not conflict, the same person may be the agent of two principals even though those principals are having dealings with each other.[3] Thus he might properly be the agent of one to make payment, and of the other to receive payment, of an agreed or ascertained sum.[4]

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[2] See Rice v. Wood (1873), 113 Mass. 133, 18 Am. Rep. 459, Mechem's Cas. 12; Everhart v. Searle (1872), 71 Pa. 256, Goddard's Cas. 514; Andrews v. Ramsay [1903], 2 K. B. 635, Goddard's Cas. 517.

[3] See Northrup v. Germania F. Ins. Co. (1879), 48 Wis. 420, 4 N. W. 350, 33 Am. Rep. 815; Nolte v. Hulbert (1882), 37 Ohio St. 445; Adams Mining Co. v. Senter (1872), 26 Mich. 73; Wassell v.

So where he is not relied upon to bargain for either party but is merely an introducer or middleman, whose function is merely to bring parties together who may then bargain for themselves—as is often the case with the real estate broker—it is frequently held that there is no legal objection to his serving in this double capacity, and that he may properly recover commissions from both principals.[5] The exceptional character of this employment, however, should clearly appear.[6]

Of course, if the double agency might otherwise be held to be objectionable, the fact that both principals with full knowledge assented to it, would cure the objection.

§ 301. —— May not deal with himself.—The same general considerations apply where the agent at the time he undertakes to act is also secretly acting in the same transaction on his own account. Except with the full knowledge and consent of his principal, an agent authorized to buy for his principal may not buy of himself;[7] an agent authorized to sell, may not sell

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Reardon (1851), 11 Ark. 705, 44 Am. Dec. 245.

In case of a conflict in interest, the agent, it is said, may decline to act for both, but act for one. Shepherd v. Lanfear (1833), 5 La. 336, 25 Am. Dec. 181.

Some agents, like the auctioneer, regularly and openly act for both parties, as in making the memorandum of sale, and as this is done with the implied consent of both parties it is unobjectionable. See Scott v. Mann (1871), 36 Tex. 157.

[4] See Nolte v. Hulbert, *supra.*

[5] See Rupp v. Sampson (1860), 82 Mass. (16 Gray.) 398, 77 Am. Dec. 416, Goddard's Cas. 518; McClure v. Luke (1907), 84 C. C. A. 1, 154 Fed. 647, 24 L. R. A. (N. S.) 659; Ranney v. Donovan (1889), 78 Mich. 318, 44 N. W. 276; Friar v. Smith (1899), 120 Mich. 411, 79 N. W. 633, 46 L. R. A. 229; Knauss v. Brewing Co. (1894), 142 N. Y. 70, 36 N. E. 867.

[6] See Walker v. Osgood (1867), 98 Mass. 348, 93 Am. Dec. 168; Scribner v. Collar (1879), 40 Mich. 375, 29 Am. Rep. 541; Raisin v. Clark (1874), 41 Md. 158, 20 Am. Rep. 66.

[7] See Conkey v. Bond (1867), 36 N. Y. 427, 3 Abb. Prac. (N. S.) 415, Goddard's Cas. 526; Taussig v. Hart (1874), 58 N. Y. 425; Disbrow v. Secor (1889), 58 Conn. 35, 18 Atl. 981.

to himself;[8] an agent authorized to buy or sell for his principal may not buy or sell for himself;[9] nor may an agent take advantage of the knowledge of his principal's business, acquired while acting in a confidential capacity, to make profit for himself at his principal's expense.[10]

The same rule applies to leases, and other similar transactions.

§ 302. —— And what the agent may not do directly, he will not be permitted to do indirectly, as by buying, selling, or dealing in the name of another, but really for himself.[11] *A*

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[8] See Rich v. Black (1896), 173 Pa. 92, 33 Atl. 380, Goddard's Cas. 527; Greenfield Bank v. Simons (1882), 133 Mass. 415, Mechem's Cas. 476; Shannon v. Marmaduke (1855), 14 Tex. 217, Goddard's Cas. 529; People v. Township Board (1863), 11 Mich. 222, Mechem's Cas. 459; Dwight v. Blackmar (1852), 2 Mich. 330, 57 Am. Dec. 130; Jansen v. Williams (1893), 36 Neb. 869, 55 N. W. 279, 20 L. R. A. 207, Goddard's Cas. 509; Meek v. Hurst (1909), 223 Mo. 688, 122 S. W. 1022, 135 Am. St. R. 531; Robertson v. Chapman (1893), 152 U. S. 673, 14 Sup. Ct. 741, 38 L. Ed. 592; Blank v. Aronson (1911), 109 C. C. A. 327, 187 Fed. 241. But see Hutton v. Sherrard (1914), 183 Mich. 356, 150 N. W. 135, L. R. A. 1915E, 976.

In Spalding v. Mattingly (1887), 89 Ky. 83, 1 S. W. 488, Goddard's Cas. 545, it is said that this rule applies only to agents who owe some discretionary or fiduciary duty, and not to mere servants.

[9] See Rose v. Hayden (1886), 35 Kan. 106, 10 Pac. 554, 57 Am. Rep. 145; Snyder v. Wolford (1885), 33 Minn. 175, 22 N. W. 254, 53 Am. Rep. 22; Wood v. Rabe (1884), 96 N. Y. 414, 48 Am. Rep. 640; Wolford v. Herrington (1873), 74 Pa. 311, 15 Am. Rep. 548; Gladiator Min. Co. v. Steele (1906), 132 Iowa 446, 106 N. W. 737.

[10] See Davis v. Hamlin (1883), 108 Ill. 39, 48 Am. Rep. 541, Mechem's Cas. 461, Wambaugh's Cas. 917; Gower v. Andrew (1881), 59 Cal. 119, 43 Am. Rep. 242, Goddard's Cas. 535; Essex Trust Co. Enright (1913), 214 Mass. 507, 102 N. E. 441, 47 L. R. A. (N. S.) 567; McKinley v. Williams (1896), 20 C. C. A. 312, 74 Fed. 94, Goddard's Cas. 523; Trice v. Comstock (1903), 57 C. C. A. 646, 121 Fed. 620, 61 L. R. A. 176, (cases in which the agent attempted to acquire and hold leases, etc., of property of which, while acting in a confidential capacity, the agent had learned the value and of the principal's desire and intention to acquire for himself). See also Forlaw v. Augusta Naval Stores Co. (1905), 124 Ga. 261, 52 S. E. 898, Goddard's Cas. 831.

[11] See Shannon v. Marmaduke (1855), 14 Tex. 217, Goddard's Cas. 529.

fortiori does the rule apply to his clerks and agents.[12]

Of course, in all these cases the transaction may be upheld if done with the full knowledge and consent of the principal, but the agent must show that fact, and he certainly cannot succeed if it appears that he withheld important information, or did not make a full and frank disclosure of the facts.[13]

§ 303. —— **May not give his time or efforts to competing interests.**—It may also be a violation of the duty of fidelity and loyalty for the agent to give his time or efforts to competing enterprises or interests. As is said in one case, "Manifestly, when a servant becomes engaged in a business which necessarily renders him a competitor and rival of his master, no matter how much or how little time and attention he devotes to it, he has an interest against his duty."[14]

§ 304. —— **Remedies of principal.**—In all of these cases wherein the principal finds that, without his knowledge or consent, he has been dealing with his agent, the transaction is voidable at the election of the principal. It makes no difference that the principal has not been injured, or that the agent has given him as good terms as anybody would, or even perhaps better terms, or that the sale or purchase has been at the price fixed by the principal; or that there was no bad faith or intention to defraud; it is still voidable at the option of the principal.

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[12] See Gardner v. Ogden (1860), 22 N. Y. 327, 78 Am. Dec. 192, Mechem's Cas. 465; Bedford Coal Co. v. Parke County Coal Co. (1909), 44 Ind. App. 390, 89 N. E. 412.

[13] See Van Dusen v. Bigelow (1904), 13 N. Dak. 277, 100 N. W. 723, 67 L. R. A. 288, Goddard's Cas. 536; Norris v. Tayloe (1868), 49 Ill. 17, 95 Am. Dec. 568; Cook v. Berlin Mills (1877), 43 Wis. 433.

[14] Dieringer v. Meyer (1877), 42 Wis. 311, 24 Am. Rep. 415. See also Thompson v. Havelock (1808), 1 Camp. 527, Wambaugh's Cas. 907; Puritas Laundry Co. v. Green (1911), 15 Cal. App. 654, 115 Pac. 660; Michigan Crown Fender v. Welch (1920), 211 Mich. 148, 178 N. W. 684, 13 A. L. R. 896. Compare Lindsay v. Swift (1918), 230 Mass. 407, 119 N. E. 787.

An agent who has agreed to give his entire time to his principal may not deal in the business of the agency for his own benefit. Michigan Crown Fender Co. v. Welch, *supra.*

On the other hand, the principal is not *obliged* to disaffirm: if he is satisfied with the transaction he may permit it to stand. The agent may not set up his own default to escape. Nor, ordinarily, may third persons raise the question if the principal does not.

§ 305.—— **If what the agent has done is to acquire for** himself what it was his duty to acquire for the principal, the principal may charge him as a trustee,[15] and, upon reimbursing him for his proper expenses, may compel a transfer to himself. And even though the agent owed no duty, because it was not within the scope of his agency, to acquire the thing in question for the principal, still if his acquisition of it was a breach of loyalty to the principal, as where its acquisition was the result of taking advantage of information acquired in a confidential capacity, the principal may charge him as a trustee. This duty of the agent not to compete with his principal does not necessarily terminate with the agency.[16]

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[15] *Statute of Frauds:*—Where what the agent does is not merely a breach of an oral contract, but a breach of trust—a violation of a fiduciary obligation,—a fraud,—the statute of frauds requiring a written contract or memorandum does not, by the weight of authority, prevent charging him as a trustee. The law creates the trust. See Rose v. Hayden, *supra;* Boswell v. Cunningham (1893), 32 Fla. 277, 13 So. 354, 21 L. R. A. 54; Brookings Land Co. v. Bertness (1903), 17 S. Dak. 293, 96 N. W. 97; Havner Land Co. v. MacGregor (1915), 169 Iowa 5, 149 N. W. 617; Wakeman v. Dodd (1876), 27 N. J. Eq. 564; Johnson v. Hayward (1905), 74 Neb. 157, 107 N. W. 384, 103 N. W. 1058, 5 L. R. A. (N. S.) 112.

See also Schmidt v. Beiseker (1905), 14 N. Dak. 587, 105 N. W. 1102, 5 L. R. A. (N. S.) 123 (action at law).

Burden v. Sheridan (1872), 36 Iowa 125, 14 Am. Rep. 505, is distinguished in 169 Iowa, *supra*, on the ground that there the agency was denied.

[16] He cannot free himself from the disability merely by resigning his agency. See Dennison v. Aldrich (1905), 114 Mo. App. 700, 91 S. W. 1024, Goddard's Cas. 541; Trice v. Comstock (1903), 57 C. C. A. 646, 121 Fed. 620, 61 L. R. A. 176; New Era Co. v. Shannon (1892), 44 Ill. App. 477; Eoff v. Irvine (1891), 108 Mo. 378, 18 S. W. 907, 32 Am. St. R. 609.

If the agent buys or acquires for himself in violation of his duty, and then sells at a profit, the principal, instead of disaffirming, may require him to account for the profit.[17]

§ 306. —— If the agent has caused a loss to his principal as by selling at a less price than he could have obtained, or by permitting the principal to deal in ignorance of material information which the agent had, and the like, the principal may ordinarily recover damages from the agent.[18]

The agent also, as will be seen, usually forfeits his right to compensation.[19]

The principal may also, as will be seen, lawfully discharge an agent guilty of disloyal conduct.

§ 307. **Further illustrations.**—For like reasons, an agent authorized to settle or compromise a claim against his principal cannot buy it and enforce it himself;[20] an agent charged, for example, with the duty of paying taxes, removing incumbrances, and the like, will not be permitted, by neglecting his duty, to allow liens or claims against his principal to accumulate, and then buy or acquire the liens or claims, or through them the property, for himself;[21] and an agent employed to investigate the state of his principal's title and report it to him, will not be permitted upon discovering an outstanding lien, or interest, to purchase it and claim under it himself.[22] The agent in such a case will be deemed to hold in trust for the principal.

[17] See McNutt v. Dix (1890), 83 Mich. 328, 47 N. W. 212, 10 L. R. A. 660; Kramer v. Winslow (1890), 130 Pa. 484, 18 Atl. 923, 17 Am. St. R. 782.

[18] See Hegenmyer v. Marks (1887), 37 Minn. 6, 32 N. W. 785, 5 Am. St. R. 808; Holmes v. Cathcart (1903), 88 Minn. 213, 92 N. W. 956, 97 Am. St. R. 513, 60 L. R. A. 734; Mickleson v. Helm (1923), — Okla. —, 214 Pac. 117.

[19] See *post*, § 416.

[20] See Albertson v. Fellows (1889), 45 N. J. Eq. 306, 17 Atl. 816; Noyes v. Landon (1887), 59 Vt. 569, 10 Atl. 342.

[21] See Bowman v. Officer (1880), 53 Iowa 640, 6 N. W. 28; Hudson v. Herman (1910), 81 Kan. 627, 107 Pac. 35; Backus v. Cowley (1910), 162 Mich. 585, 127 N. W. 775; Page v. Webb (1888), 7 S. W. (Ky.) 308, 9 Ky. Law Rep. 868, Wambaugh's Cas. 923.

[22] See Ringo v. Binns (1836), 35 U. S. (10 Peters) 269, 9 L. Ed. 420; Vallette v. Tedens (1887), 122 Ill. 607, 14 N. E. 52, 3 Am. St. R. 502.

§ 308. —— If the agent in discharging his duty gets a good bargain or makes profits which are the fruits of the agency, the gain or profit belongs to the principal, who can compel a transfer to himself. The same rule applies to rebates, discounts or other savings which the agent effects in the execution of the agency.[23]

There are many other cases which fall within the operation of the same principle. Thus an agent employed to sell, and in the meantime to more or less care for and protect his principal's interest in, certain real estate was held incompetent to buy it at a foreclosure sale and hold it against his principal, even though he did not make that sale. Kimball v. Ranney (1899), 122 Mich. 160, 80 N. W. 992, 80 Am. St. R. 548, 46 L. R. A. 403. See also Adams v. Sayre (1881), 70 Ala. 318.

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[23] If the agent sells for more, or buys for less, or gets more for the same price, than was expected, the principal is entitled to the benefit. If the agent exacts extra bonuses, commissions or rewards for performing his duty, the principal may demand them. If he conceals important facts, as for example that the property can be sold for more, inducing his principal to convey to him at the lesser price, and he then sells for the greater price, the profit belongs to the principal.

See Rochester v. Levering (1885), 104 Ind. 562, 4 N. E. 203, Mechem's Cas. 478; Leach v. Hannibal, etc., Ry. Co. (1885), 86 Mo. 27, 56 Am. Rep. 408, Mechem's Cas. 480; Andrews v. Ramsay [1903], 2 K. B. 635, Goddard's Cas. 517; Turnbull v. Garden (1869), 38 L. J. Ch. 331, Goddard's Cas. 520; Hegenmyer v. Marks (1887), 37 Minn. 6, 32 N. W. 785, 5 Am. St. R. 808; Kramer v. Winslow (1890), 130 Pa. 484, 18 Atl. 923, 17 Am. St. R. 782; Simons v. Vulcan Oil Co. (1869), 61 Pa. 202, 100 Am. Dec. 628; Michigan Crown Fender Co. v. Welch (1919), 211 Mich. 148, 178 N. W. 684, 13 A. L. R. 896.

This rule would not apply to gratuities or "tips" which the agent was expected to keep as part of or in addition to his wages or salary, like the tips of the Pullman car porter, or of the waiter in a restaurant. So of the tips given to the employee at a shoe polishing stand. See Polites v. Barlin (1912), 149 Ky. 376, 149 S. W. 828, 41 L. R. A. (N. S.) 1217; Zappas v. Roumeliote (1912), 156 Iowa 709, 137 N. W. 935.

Nor to purely personal and unusual gifts or presents if they were not covertly bribes or bonuses. Compare Aetna Ins. Co. v. Church (1871), 21 Ohio St. 492; Mitchell v. Sparling (1910), 3 Sask. L. R. 213.

As to things found by the agent, see Burns v. Clark (1901), 133

It is immaterial whether the profit or advantage is the result of the performance or of the violation of the agent's duty, if it be the fruit of the agency.

§ 309. Usage does not alter rule.—The rule which forbids the agent's dealing with himself or taking advantage of his position to make profit for himself at the expense of his principal, or having compensation from both parties, cannot be defeated by any local or temporary usage,[24] nor does it make any difference that the agent was acting without pay.[25]

2. *Not to Exceed his Authority.*

§ 310. Agent's duty not to exceed his authority.—It is, in general, the duty of the agent in all his acts and contracts for the principal to keep within the limits of his authority; and he will, in general, be liable to his principal for the losses caused to the principal by his failure to do so. Cases falling more specifically under the head of disobedience of instructions, or failure to exercise due care in executing the authority, will be considered separately.

The measure of the authority as between the principal and third persons is not necessarily the same as that between the principal and the agent. A number of qualifications may affect third persons, such as custom, appearances, and the like, which the agent knows are not designed to be operative. It may thus be within the *power* of the agent to bind his principal to third

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Cal. 634, 66 Pac. 12, 85 Am. St. R. 233, and cases cited.

As to agent's earnings in principal's time, see Jackson v. Seevers (1902), 115 Iowa 370, 88 N. W. 931; Clarke v. Kelsey (1894), 41 Neb. 766, 60 N. W. 138.

As to the right to discharge for taking gifts from customers, see Wade v. Dry Goods Co. (1911), 155 Mo. App. 405, 134 S. W. 1084.

[24] See Robinson v. Mollett (1874), L. R. 7 H. L. 802, Wambaugh's Cas. 908; Merchants Ins. Co. v. Prince (1892), 50 Minn. 53, 52 N. W. 131, 36 Am. St. R. 626; Raisin v. Clark (1874), 41 Md. 158, 20 Am. Rep. 66; Farnsworth v. Hemmer (1861), 83 Mass. (1 Allen) 494, 79 Am. Dec. 756, Goddard's Cas. 316.

[25] See Hunsaker v. Sturgis (1865), 29 Cal. 142.

persons, although it would not be within his right to do so. If in such a case he should impose a liability upon the principal, it would be a wrongful act for which he must answer to the principal.

§ 311. Duty of principal to define extent of authority.—It is, of course, the duty of the principal, who demands that his agent shall keep within his authority, to make the limits of the authority reasonably clear and *definite*. The principal is the one who usually takes the initiative in creating the relation, and he determines the nature of the authority and fixes its limits and extent.

§ 312. Duty of agent to know extent of his authority.—At the same time it must ordinarily be the duty of the agent to know the extent of his authority. He has commonly ample means to ascertain it. If he is in doubt he may usually communicate with the principal and have the doubt removed. He certainly should not voluntarily proceed blindly without inquiry.

A number of considerations, however, may affect this question. The authority may have originally been ambiguous in fact without the agent's knowing it. The agent may be confronted by an unforeseen dilemma, where he must act, and the principal cannot be consulted. He may need further information which he can not procure, and yet be constrained to act. In such cases, the special circumstances may relieve him from liability to his principal.

§ 313. Liability of agent for exceeding his authority.—Where the agent, through a culpable failure to observe the limits of his authority, has caused a natural and proximate loss to his principal, he will be liable to the latter for the loss so sustained.[26]

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[26] See Pape v. Westacott [1894], 1 Q. B. 272; Rush v. Rush (1897), 170 Ill. 623, 48 N. E. 990; Persons v. Smith (1903), 12 N. Dak. 403, 97 N. W. 551; Cooper v. Cooper (1911), 90 Neb. 209, 133 N. W. 243; Holmes v. Langston (1900), 110 Ga. 861, 36 S. E. 251.

§ 314. Liability of mere intermeddler.—*A fortiori* where a person who has not been appointed agent for any purpose wrongfully pretends to be the agent of another, and without any authority does an act which causes him loss or expense, as, for example, when he assumes to make a contract for the sale of his land and causes that contract to be put upon the public records, so that the alleged principal is put to trouble and expense in clearing his title, the wrongdoer will be liable for the loss so caused.[27]

3. *To Obey Instructions.*

§ 315. Agent must obey instructions.—It is the duty of the agent to obey the lawful instructions of his principal; and if he disobeys them without sufficient excuse, he is liable to the principal for any loss which the principal may thereby naturally and proximately sustain.

Illustrations of the operation of this rule are very numerous. Thus, if the principal instructs his agent to insure property, and it is lost, without insurance, such failure of insurance being attributable to the agent's disobedience, the agent must answer for it;[28] if the agent of an insurance company is directed to cancel a certain policy, and he fails to do so, during which failure the property is destroyed and the company has to pay for the loss, the agent will be liable to the company;[29] if an agent is instructed to sell or buy goods at a certain time, and he neglects until a change in price causes the principal loss, or a change in circumstances destroys the market, the agent will be liable;[30] if he is instructed to sell for cash only, and gives credit to irresponsible persons or takes checks which prove to be worthless, and the like, the agent will be liable;[31] if an agent who undertakes to collect a debt is instructed to take certain steps, or to act at once or at a given time, and disobeys or disregards the instructions with the result that a collectible debt is lost to the principal, the agent must answer for it;[32] if an agent for the sale of goods or other property is instructed not to let it go without obtaining security, and does part with it without security, to the principal's loss, the agent must answer for it.[33]

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[27] See Philpot v. Taylor (1874), 75 Ill. 309, 20 Am. Rep. 241.

[28] See Thorne v. Deas (1809), 4 Johns. (N. Y.), 84, Wambaugh's Cas. 883; Schoenfeld v. Fleischer (1874), 73 Ill. 404; Sawyer v. Mayhew (1863), 51 Me. 398; Backus v. Ames (1900), 79 Minn. 145, 81 N. W. 766.

[29] See Phoenix Ins. Co. v. Frissell (1886), 142 Mass. 513, 8 N. E. 348; Kraber v. Union Ins. Co. (1889), 129 Pa. 8, 18 Atl. 491; Queen City F. Ins. Co. v. First Nat. Bank (1909), 18 N. Dak. 603, 120 N. W. 545, 22 L. R. A. (N. S.) 509; British Am. Ins. Co. v. Wilson (1905), 77 Conn. 559, 60 Atl. 293; Continental Ins. Co. v. Clark (1904), 126 Iowa 274, 100 N. W. 524.

§ 316. Good faith, etc., no excuse.—The fact that the agent in disobeying the instructions, acted in good faith, or intended to benefit the principal, is no defense if his disobedience caused the loss.[34] Neither is the fact that he was not to be paid for his services, if he has actually entered upon the performance of his undertaking; if he has not so entered upon its performance, then a want of consideration would be a good defense for not undertaking the performance.[35]

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[30] See Galigher v. Jones (1888), 129 U. S. 193, 9 Sup. Ct. 335, 32 L. Ed. 658; Zimmerman v. Heil (1895), 86 Hun 114, 33 N. Y. Supp. 391, 2 N. Y. Ann. Cas. 103, 67 N. Y. St. R. 136, aff'd 156 N. Y. 703, 51 N. E. 1094; Fuller v. Ellis (1867), 39 Vt. 345, 94 Am. Dec. 327.

See also Henry v. Buckner (1889), 13 Colo. 18, 21 Pac. 916; Levison v. Balfour (1888), 34 Fed. 382, 13 Sawy. 223; Union Hardware Co. v. Plume & Atwood (1889), 58 Conn. 219, 20 Atl. 455.

[31] See Pape v. Westacott [1894], 1 Q. B. 272; Hall v. Storrs (1858), 7 Wis. 253, Goddard's Cas. 548; Robinson Machine Works v. Vorse (1879), 52 Iowa 207, 2 N. W. 1108; Harlan v. Ely (1886), 68 Cal. 522; Sheffield v. Linn (1886), 62 Mich. 151, 28 N. W. 761.

[32] See Whitney v. Express Co. (1870), 104 Mass. 152, 6 Am. Rep. 207, Mechem's Cas. 484; Butts v. Phelps (1883), 79 Mo. 302.

[33] See Leven v. Lolcama (1922), — Colo. —, 211 Pac. 870.

Other cases: Same rule where agent to deliver a deed on certain conditions delivered it in violation of them. Triggs v. Jones (1891), 46 Minn. 277, 48 N. W. 1113.

[34] See Switzer v. Connett (1847), 11 Mo. 88; Rechtsherd v. Bank of St. Louis (1870), 47 Mo. 181, Wambaugh's Cas. 900.

[35] See Passano v. Acosta (1832),

If the agent could show that, notwithstanding his disobedience, the same loss would have followed from other causes for which he was not responsible, that might be a defense, but such a showing would usually be very difficult to make. Thus where an agent who had collected money for his principal was directed to send it in bills of large denomination, and, instead, he sent it in a necessarily bulkier package of bills of small denomination, and this package was lost, the court said: "It is not sufficient that the deviation was not material, if it appears that the party giving the instructions regarded them as material, unless it be shown affirmatively that the deviation in no manner contributed to the loss. This may be a difficult task in a case like the present; but the defendant (the agent) voluntarily assumed it when he substituted his own plan for that prescribed by the plaintiff."[36]

§ 317. In what form of action liable.—If the agent's breach of instructions relates merely to the manner of doing the act authorized, that is, if he does that act but does not do it as he was directed to do it, then the principal's action against him will be an action on the case for damages; but if the agent's default has consisted in the doing of some other act, *e. g.*, in the disposition of property in an entirely different way, that is, in a way or for a purpose not authorized at all, he will be liable to the principal in an action of trover for a conversion.[37]

§ 318. Sudden emergency as excuse.—A departure from instructions may be justified by a sudden emergency not caused by the agent's fault, where there is no time to communicate with

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4 La. 26, 23 Am. Dec. 470, Mechem's Cas. 490; Nixon v. Bogin (1886), 26 S. C. 611, 2 S. E. 302, Mechem's Cas. 492; Thorne v. Deas (1809), 4 Johns. (N. Y.) 84, Wambaugh's Cas. 883; Williams v. Higgins (1868), 30 Md. 404; Marshall v. Ferguson (1902), 94 Mo. App. 175, 67 S. W. 935.

[36] See Wilson v. Wilson (1856), 26 Pa. 393, Goddard's Cas. 546.

[37] See Laverty v. Snethin (1877), 68 N. Y. 522, 53 How. Prac. 152, 23 Am. Rep. 184, Mechem's Cas. 486; Minneapolis Trust Co. v. Mather (1905), 181 N. Y. 205, 73 N. E. 987, Goddard's Cas. 558.

the principal, but something must be done and a strict compliance with the instructions becomes impossible or would be detrimental to the interests of the principal.[38]

Primarily, of course, it is for the principal, rather than for the agent, to decide what shall be done in an emergency; and it is only where the principal cannot be consulted, and where the circumstances will not admit of delay that the agent may decide.[39]

And even where an emergency justifies a departure from instructions, the agent must go no further than the emergency reasonably demands; he may not loosely assume any and all powers.[40]

§ 319. Ambiguous instructions.—If the instructions are ambiguous, and the agent in good faith adopts one reasonable construction, he will not be liable because the principal may have intended another.[41] Usage may aid in the interpretation of doubtful instructions, though, as will be seen in the following section, it will not justify a breach of positive instructions to the contrary.

And, because the instructions are ambiguous, the agent will not be justified in disregarding them altogether, and following ideas of his own not within any interpretation of the instructions.[42]

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[38] See Greenleaf v. Moody (1866), 13 Allen (95 Mass.), 363, Goddard's Cas. 550; Bartlett v. Sparkman (1888), 95 Mo. 136, 8 S. W. 406, 6 Am. St. R. 35; Harter v. Blanchard (1873), 64 Barb. (N. Y.) 617; Williams v. Shackleford (1849), 16 Ala. 318.

[39] See Gwilliam v. Twist [1895], 2 Q. B. 84, Wambaugh's Cas. 951; Hawtayne v. Bourne (1841), 7 Mees. & W. 595, Wambaugh's Cas. 301.

[40] See Foster v. Smith (1865), 42 Tenn. (2 Cold.) 474, 88 Am. Dec. 604 (where an agent was employed to transport grain by river boat, and the boat sank in shallow water, it was said that the emergency would have justified measures to save the cargo, but did not justify selling it to the carrier in consideration of the freight).

[41] See Minnesota Linseed Oil Co. v. Montague (1884), 65 Iowa 67, 21 N. W. 184; Hopwood v. Corbin (1884), 63 Iowa 218, 18 N. W. 911; Berry v. Haldeman (1897), 111 Mich. 667, 70 N. W. 325; Falsken v. Falls City Bank (1904), 71 Neb. 29, 98 N. W. 425, Goddard's Cas. 554; Bevis v. Abstract Co. (1911), 62 Wash. 513, 114 Pac. 191.

§ 320. Effect of custom.—It is ordinarily not only the right but the duty of the agent to observe and comply with such valid and established customs and usages as apply to the subject matter or the performance of his agency.[43] Such customs and usages, however, cannot, as between the principal and the agent, overrule positive instructions to the contrary.[44]

§ 321. Illegality of act required.—No general undertaking to act as agent could include the obligation to perform illegal or immoral acts. And even if there had been an express agreement to perform such an act, the agreement would not be enforced.[45]

§ 322. Acts which would imperil agent's security.—An agent who has advanced money to his principal or incurred obligations for him, upon the security of the principal's goods or property in the agent's possession, would not be obliged to obey subsequent instructions to sell or otherwise dispose of the property in such a way as to imperil his security, unless the principal should either reimburse him or give him other security.[46]

[42] See Oxford Lake Line v. First Nat. Bank (1898), 40 Fla. 349, 24 So. 480.

[43] See Leroy v. Beard (1850), 49 U. S. (8 How.) 451, 12 L. Ed. 1151, Mechem's Cas. 382.

[44] See Wanless v. McCandless (1873), 38 Iowa 20; Robinson Machine Works v. Vorse (1879), 52 Iowa 207, 2 N. W. 1108; Osborne v. Rider (1885), 62 Wis. 235, 22 N. W. 394; Hall v. Storrs (1858), 7 Wis. 253, Goddard's Cas. 548; Cohen v. Kittell (1889), 22 Q. B. Div. 680, Wambaugh's Cas. 902.

[45] Compare Sykes v. Beadon (1879), 11 Ch. Div. 170, 193; Brown v. Howard (1817), 14 Johns. (N. Y.), 119; Davis v. Barger (1877), 57 Ind. 54; Elmore v. Brooks (1871), 53 Tenn. (6 Heisk.) 45.

[46] See Davis v. Kobe (1886), 36 Minn. 214, 30 N. W. 662, 1 Am. St. R. 663, Mechem's Cas. 700; Feild v. Farrington (1869), 77 U. S. (10 Wall.) 141, 19 L. Ed. 923, Goddard's Cas. 556; Brown v. McGran (1840), 39 U. S. (14 Peters) 479, 10 L. Ed. 550; Heffner v. Cotton Co. (1908), 87 C. C. A. 606, 160 Fed. 635.

§ 323. **Ratification of disobedience.**—Even though the agent may have disobeyed the principal's instructions, the doing of the act as it was done may be ratified and approved by the principal, and if it is the agent's liability to the principal will be released.[47]

Such ratification, as in other cases, must be with knowledge of the facts; but in these cases between principal and agent, courts have often shown a tendency to interpret the facts liberally in favor of ratification, and a failure to dissent after knowledge has frequently been held to be enough, especially where the agent has himself reported his action to the principal.[48] But the facts of a given case may rebut any inference of approval.[49]

4. *To Exercise Care.*

§ 324. **Duty to exercise reasonable care.**—It is also the duty of the agent not to be negligent in the performance of his undertaking. Negligence is the failure to exercise that degree of care ordinarily and reasonably to be expected under the circumstances of the case. By accepting an employment whose requirements he knows, without stipulating otherwise, the agent impliedly undertakes that he possesses a degree of skill reasonably or ordinarily competent for the performance of the service, and that in performing his undertaking he will exercise reasonable care, skill and diligence. He does not agree that he will make no mistakes whatever, or that he will exercise the highest skill or diligence, but he does agree that he will exercise reasonable skill, and that he will take the usual precautions.[50]

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[47] See Lunn v. Guthrie (1902), 115 Iowa 501, 88 N. W. 1060; Wann v. Scullin (1911), 235 Mo. 629, 139 S. W. 425; Osborne v. Durham (1911), 157 N. Car. 262, 72 S. E. 849.

[48] See Bray v. Gunn (1874), 53 Ga. 144, Goddard's Cas. 553; Austin v. Ricker (1881), 61 N. H. 97; Meyer v. Morgan (1875), 51 Miss. 21, 24 Am. Rep. 617; Halloway v. Milling Co. (1908), 77 Kan. 76, 93 Pac. 577; Allen v. McAllister (1905), 39 Wash. 440, 81 Pac. 927.

[49] See Triggs v. Jones (1891), 46 Minn. 277, 48 N. W. 1113.

[50] See Page v. Wells (1877), 37 Mich. 415, Mechem's Cas. 493; Johnson v. Martin (1856), 11 La. Ann. 27, 66 Am. Dec. 193, Mechem's Cas. 495; Bowerman v.

§ 325. Special skill required in some cases.—There are many cases, however, wherein more than the skill possessed by the ordinary man may reasonably be required. Thus, where the agent is employed and undertakes to serve in a capacity which implies the possession and exercise of special skill, as, for example, when an attorney at law, a physician, a broker, etc., undertakes to do some act in the line of his special calling, then the skill ordinarily possessed and exercised by persons pursuing that calling may reasonably be required.[51]

More than the ordinary skill may also be reasonably required where the agent, though perhaps not belonging to any of the specially skilled classes, has in the particular case specially undertaken to exercise or has held himself out as possessing extraordinary skill.[52]

§ 326. How when services gratuitous.—When an agent professing or exercising a calling which implies the possession of special skill is employed in the line of his calling, the fact that he was not to be paid for his services is no excuse for not exercising such skill; but one serving gratuitously in other cases would not be expected to possess special skill, and unless he had it in fact or specially undertook to exercise it, he would not be liable in the absence of what is often termed gross negligence or bad faith.[53]

Rogers (1887), 125 U. S. 585, 8 S. Ct. 986, 31 L. Ed. 815; Paul v. Grimm (1895), 165 Pa. 139, 30 Atl. 721, 44 Am. St. 648; Richardson v. Taylor (1883), 136 Mass. 143, Goddard's Cas. 561; Lake City Flouring Mill Co. v. McVean (1884), 32 Minn. 301, 20 N. W. 233, Goddard's Cas. 561; Adams v. Robinson (1880), 65 Ala. 586, Goddard's Cas. 563; Morrison v. Orr (1832), 3 Stew. & P. (Ala.) 49, 23 Am. Dec. 319, Goddard's Cas. 564; Walker v. Smith (1804), 1 Wash. C. C. 152, Fed. Cas. No. 17086, 4 Dall. 387, 1 L. Ed. 878, Goddard's Cas. 567; Briere v. Taylor (1905), 126 Wis. 347, 105 N. W. 817.

[51] See Craig v. Chambers (1876), 17 Ohio St. 253; Howard v. Grover (1848), 28 Me. 97, 48 Am. Dec. 478; McNevins v. Lowe (1866), 40 Ill. 209.

[52] See Isham v. Post (1894), 141 N. Y. 100, 35 N. E. 1084, 38 Am. St. R. 766, 23 L. R. A. 90.

[53] See Foster v. Essex Bank (1821), 17 Mass. 479, 9 Am. Dec. 168; Shiells v. Blackburne (1789),

§ 327. Negligence in loaning money.—An agent employed to make loans does not impliedly warrant the safety of his loans or the solvency of the borrower, but he does undertake to use reasonable and proper care, and he will be liable for losses occurring from his negligence, as, *e. g.*, in loaning to irresponsible parties, or from a neglect to obtain suitable security, or to secure and perfect the proper evidences of the loan.[54]

§ 328. Negligence in effecting insurance.—In the same way, an agent employed to effect insurance does not impliedly guarantee the soundness of the company or the collection of the insurance money, but he would be liable for a loss proximately resulting from his negligence, as, for example, in insuring in a company not in good standing, or in taking defective policies, or in procuring insufficient amounts, or in ignoring the instructions of his principal.[55] *A fortiori* would he be liable if he neither insured at all, nor advised his principal so that he could protect himself.

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1 H. Blackstone, 158; Williams v. McKay (1885), 40 N. J. Eq. 189, 53 Am. Rep. 775; First National Bank v. Ocean National Bank (1875), 60 N. Y. 278, 19 Am. Rep. 181; Isham v. Post (1894), 141 N. Y. 100, 35 N. E. 1084, 38 Am. St. R. 766, 23 L. R. A. 90.

An agent who in fact possessed special skill would be expected to exercise it, though serving gratuitously, unless the circumstances or the terms of the employment excluded it. Wilson v. Brett (1843), 11 Mees. & Wels. 113, Wambaugh's Cas. 890.

[54] See Bank of Owensboro v. Western Bank (1877), 13 Bush (Ky.) 526, 26 Am. Rep. 211, Mechem's Cas. 206; Harlow v. Bartlett (1898), 170 Mass. 584, 49 N. E. 1014; DeHart v. DeHart (1906), 70 N. J. Eq. 774, 67 Atl. 1074; Momsen v. Atkins (1900), 105 Wis. 557, 81 N. W. 647; Hitchcock v. Cosper (1904), 164 Ind. 633, 73 N. E. 264; Wagner v. Phillips (1900), 12 S. Dak. 335, 81 N. W. 632.

[55] See Storer v. Eaton (1861), 50 Me. 219, 79 Am. Dec. 611; Strong v. High (1842), 2 Rob. (La.) 103, 38 Am. Dec. 195; Schoenfeld v. Fleisher (1874), 73 Ill. 404; Sawyer v. Mayhew (1863), 51 Me. 398; Brant v. Gallup (1885), 111 Ill. 487, 53 Am. Rep. 638; Milburn Wagon Co. v. Evans (1882), 30 Minn. 89, 14 N. W. 271; Thorne v. Deas (1809), 4 Johns. (N. Y.) 84; Elam v. Smithdeal Realty & Ins. Co. (1921), 182 Nor. Car. 599, 109 S. E. 632, 18 A. L. R. 1210.

§ 329. **Negligence in collecting.**—So an agent employed to make collections does not impliedly guarantee that he will collect the money, or (unless charged with the duty of special diligence), that he will drop all other business and attend solely to that; but he is liable for a loss of the debt which results from his failure to exercise reasonable care, skill and diligence in collecting the money, as by unreasonable delay until the debtor had become insolvent, granting unwarranted extensions, failing to institute the proper proceedings, neglecting proper demands, or presentments for payment, omitting required notices, accepting worthless funds, and the like; or, having once collected the money, for a loss of the proceeds caused by negligence or disregard of instructions in remitting it.[56]

§ 330. —— **Liability of collection agent for defaults of his correspondents.**—An attorney who takes a claim "for collection" without qualification as to his liability is liable for the defaults of his own clerks and agents, and if he sends the claim to another attorney for collection, he is generally held liable for the latter's defaults.[57] Whether a bank which undertakes to collect is liable for the default of its correspondent banks, is disputed. Many distinguished courts hold that it is so liable where it has not limited its liability at the time of accepting the service;[58] a large number, perhaps a majority, of the State courts hold that the liability of the bank normally extends no further than to exercise due care in the selection of its correspondent, giving it proper instructions, and the like.[59] Banks and other collecting agencies now quite generally attempt to limit their liability by notices to or agreements with their patrons.[60]

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[56] See Butts v. Phelps (1883), 79 Mo. 302; Walker v. Walker (1871), 5 Heisk. (Tenn.) 425; Wilson v. Wilson (1856), 26 Penn. St. 393; Foster v. Preston (1828), 8 Cowen (N. Y.) 198; Kerr v. Cotton (1859), 23 Tex. 411; Buell v. Chapin (1868), 99 Mass. 594, 97 Am. Dec. 58; Richards v. Insurance Co. (1861), 43 N. H. 263; First Nat. Bank v. Fourth Nat. Bank (1879), 77 N. Y. 320, 33 Am. Rep. 618; Omaha Nat. Bank v. Kiper (1908), 60 Neb. 33, 82 N. W. 102; Dern v. Kellogg (1898), 54 Neb. 560, 74 N. W. 844; Sahlien v. Bank of Lonoke (1891), 90 Tenn. 221, 16 S. W. 373; Kirkeys v. Crandall (1891), 90 Tenn. 532, 18 S. W. 246; Morris v. Eufaula Nat. Bank (1898), 122 Ala. 580, 25 So. 499, 82 Am. St. R. 95.

[57] See Cummins v. Heald (1880), 24 Kan. 600, 36 Am. Rep. 264, Mechem's Cas. 247; Walker v. Stevens (1875), 79 Ill. 193; Abbott v. Smith (1853), 4 Ind. 452; Rhines v. Evans (1870), 66 Pa. 192, 5 Am. Rep. 364.

For commercial or collection agencies, see Bradstreet v. Everson (1872), 72 Pa. 124, 13 Am. Rep. 665; Weyerhauser v. Dun (1885), 100 N. Y. 150, 2 N. E. 274; Sanger v. Dun (1879), 47 Wis. 615, 3 N. W. 388, 32 Am. Rep. 789.

Express companies: American Express Co. v. Haire (1863), 21 Ind. 4, 83 Am. Dec. 334.

§ 331. Negligence in making sales.—An agent who undertakes to sell real or personal property would not *ipso facto* agree that he would certainly make a sale, or that he would do it within any particular time or at any particular price, though he might agree to any or all of these things by special contract. In the absence of that, his obligation would be to exercise reasonable care, skill and diligence in the matter. Frequently there will be special stipulations with or instructions to him as to the terms, conditions, prices, and the like, which he shall endeavor to secure, and these he should observe. If there were no such instructions, he should proceed in the usual and ordinary manner. He should sell, and not mortgage, pledge, exchange, or give away. If he were entrusted with goods to sell it would be his duty, in the absence of a usage or authority to the contrary, to sell for cash only,[61] and even if authorized to sell upon credit, he must exercise reasonable care and prudence in selling only to responsible purchasers.[62] If the terms of his employment required that he should exact notes, mortgages, endorsers, or other forms of security, he would ordinarily be liable if he let the goods go without obtaining them.[63]

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[58] See Mackersy v. Ramsays (1843), 9 Clark & F. 818, (House of Lords); Exchange Nat. Bank v. Third Nat. Bank (1884), 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722, Mechem's Cas. 239; Ayrault v. Pacific Bank (1872), 47 N. Y. 570, 7 Am. Rep. 489; Bailie v. Augusta Savings Bank (1894), 95 Ga. 277, 21 S. E. 717, 51 Am. St. R. 74; First Nat. Bank v. Craig (1895), 3 Kan. App. 166, 42 Pac. 830; Martin v. Hibernia Bank (1910), 127 La. 301, 53 So. 572; Simpson v. Waldby (1886), 63 Mich. 439, 30 N. W. 199; Streissguth v. Nat. Bank (1890), 43 Minn. 50, 44 N. W. 797, 19 Am. St. R. 213, 7 L. R. A. 363; Power v. First Nat. Bank (1887), 6 Mont. 251, 12 Pac. 597; Titus v. Mechanics' Nat. Bank (1871), 35 N. J. L. 588; Bank v. Butler (1885), 41 Ohio St. 519, 52 Am. Rep. 94.

[59] See Dorchester Bank v. New England Bank (1848), 55 Mass. (1 Cush.) 177; Lawrence v. Stonington Bank (1827), 6 Conn. 521; Aetna Ins. Co. v. Alton Bank (1861), 25 Ill. 243, 79 Am. Dec. 328; Irwin v. Pulley Co. (1897), 20 Ind. App. 101, 48 N. E. 601, 50 N. E. 317; Guelich v. National Bank (1881), 56 Iowa 434, 9 N. W. 328, 41 Am. Rep. 110; Third Nat. Bank v. Vicksburg Bank (1883), 61 Miss. 112, 48 Am. Rep. 78; Daly v. Butchers' Bank (1874), 56 Mo. 94, 17 Am. Rep. 663; First Nat. Bank v. Sprague (1892), 34 Neb. 318, 51 N. W. 846, 33 Am. St. R. 644, 15 L. R. A. 498; Merchants' Nat. Bank v. Goodman (1885), 109 Pa. 422, 2 Atl. 687, 58 Am. Rep. 728; Plymouth Bank v. Gilman (1896), 9 S. Dak. 278, 68 N. W. 735, 62 Am. St. R. 868; Bank of Louisville v. First Nat. Bank (1874), 67 Tenn. (8 Baxt.) 101, 35 Am. Rep. 691; Stacy v. Dane County Bank (1860), 12 Wis. 629.

[60] See Minneapolis Sash & Door Co. v. Metropolitan Bank (1899), 76 Minn. 136, 78 N. W. 980, 77 Am. St. R. 609, 44 L. R. A. 504.

§ 332. Liability of agent for negligence of sub-agent, co-agent, joint agent.—As has been already seen, an agent is liable to his principal for the defaults of a sub-agent when and only when, under the rules there laid down, the sub-agent is to be deemed the agent of the agent only, and not of the principal.[64]

Where two or more agents are severally employed by the same principal, one of them, if not himself at fault, will not ordinarily be liable to the common principal for the default of the other; but where two or more jointly undertake to do an act for a private principal, each one will ordinarily be liable for the failure to perform, even though that failure were caused by the default of another of the joint agents.[65]

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[61] See Payne v. Potter (1859), 9 Iowa 549; Norton v. Nevills (1899), 174 Mass. 243, 54 N. E. 537; Kops v. Smith (1904), 137 Mich. 28, 100 N. W. 169; Bowles v. Rice (1907), 107 Va. 51, 57 S. E. 575.

[62] See Tate v. Marco (1887), 27 S. Car. 493, 4 S. E. 71; Frick v. Larned (1893), 50 Kan. 776, 32 Pac. 383; Morris v. Bradley (1910), 20 N. Dak. 646, 128 N. W. 118.

[63] See Clark v. Roberts (1873), 26 Mich. 506; Robinson Machine Works v. Vorse (1879), 52 Iowa 207, 2 N. W. 1108; Harlow v. Bartlett (1896), 170 Mass. 584, 49 N. E. 1014; Osborne v. Rider (1885), 62 Wis. 235, 22 N. W. 394; Avery Planter Co. v. Murphy (1897), 6 Kan. App. 29, 49 Pac. 626.

[64] See *ante*, § 181.

§ 333. Liability for loss to principal resulting from agent's negligence as to third person.—Thus far the person injured directly by the agent's negligence has been assumed to be the principal; but it is also the duty of the agent to his principal not to cause loss to his principal by his negligent injury of a third person. Thus if a servant acting in the course of his employment negligently injured a third person, for which injury the master was made to respond in damages, the master would be entitled to recover from his servant who caused the injury the amount of the loss the master had thereby sustained.[66]

5. *To Account for Money and Property.*

§ 334. Duty to account.—It is the duty of the agent to account to his principal for all money or property which comes to his hands belonging to the principal.[67]

This includes not only all property and money received by the agent directly from his principal, or from third persons for the principal, but also all that which by law enures to the benefit of the principal, like profits, rebates or similar advantages which come to the agent's hands as a fruit of the agency.[68]

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[65] See Milwaukee Harvester Co. v. Finnegan (1890), 43 Minn. 183, 45 N. W. 9.

[66] See Grand Trunk Ry. Co. v. Latham (1874), 63 Me. 177; Smith v. Foran (1875), 43 Conn. 244, 21 Am. Rep. 647.

[67] See Dodge v. Hatchett (1903), 118 Ga. 883, 45 S. E. 667, Goddard's Cas. 569; Jett v. Hempstead (1869), 25 Ark. 462, Mechem's Cas. 496; Salem Traction Co. v. Anson (1902), 41 Oreg. 562, 67 Pac. 1015, 69 Pac. 675, Goddard's Cas. 578; Coffin v. Craig (1903), 89 Minn. 226, 94 N. W. 680; Taul v. Edmondson (1872), 37 Tex. 556.

[68] See Forlaw v. Naval Stores Co. (1905), 124 Ga. 261, 52 S. E. 898; Hair v. Dailey (1896), 161 Ill. 379, 43 N. E. 1096; Salsbury v. Ware (1900), 183 Ill. 505, 56

The fact that the receipt or acquisition of the property or money was not originally authorized would not be material, if the agent acted as such and the principal has ratified the act. Money or property put into the agent's hands for a purpose which was subsequently abandoned, countermanded or found impossible of attainment, before the agent had acted or bound himself to others to act, would be within the rule.

§ 335. Agent may not deny his principal's title.—It is not ordinarily competent for an agent who has received money or property from or for his principal, and who is called upon to account for it, to undertake to show that it did not then belong to his principal. Even if that were so, it would not therefore become the property of the agent. His act in receiving it as the principal's is, in a sense, an acknowledgment of the principal's title, and the agent may not officiously make himself the protector or defender of the rights of some other alleged owner who is making no claim for himself.[69] If the agent has already been divested by or has yielded to the paramount title he may show that fact in his defense.[70]

§ 336. May not set up the illegality of the origin of the money.—So an agent who has received money or property for his principal, and who is called upon to account for it, may not show that the property or money was the proceeds of some illegal transaction in which the principal was or had been en-

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N. E. 149; Schick v. Suttle (1905), 94 Minn. 135, 102 N. W. 217; Graham v. Cummings (1904), 208 Pa. 516, 57 Atl. 943.

[69] See Monongahela Nat. Bank v. First Nat. Bank (1910), 226 Pa. 270, 75 Atl. 359, 26 L. R. A. (N. S.), 1098; Collins v. Tillou (1857), 26 Conn. 368, 68 Am. Dec. 398; Hancock v. Gomez (1871), 58 Barb. (N. Y.) 490, Goddard's Cas. 585; Witman v. Felston (1859), 28 Mo. 601, Goddard's Cas. 580; Dixon v. Hamond (1809), 2 B. & Ald. 310, Goddard's Cas. 579; Pittsburg Min. Co. v. Spooner (1889), 74 Wis. 307, 42 N. W. 259, 17 Am. St. R. 149; Floyd v. Patterson (1888), 72 Tex. 202, 10 S. W. 526, 13 Am. St. R. 787, aff'd 18 S. W. 654.

[70] See Moss Mercantile Co. v. First Nat. Bank (1905), 47 Oreg. 361, 82 Pac. 8, 2 L. R. A. (N. S.) 657, 8 Ann. Cas. 569, Goddard's Cas. 585.

gaged, but which was independent of and separate from the undertaking of the agent to receive and account for it.[71] But where compelling the agent to account would require the court to enforce the illegal act or contract itself, the illegality would be a bar.[72]

Where the principal has put property or money into the hands of an agent to be thereafter devoted to an unlawful purpose, the principal may repent and recover the property or money, if he does so while the transaction still remains unexecuted.[73]

§ 337. Agent's duty to keep accounts.—As part of this duty to account may be considered the agent's duty to keep accounts. It is, of course, not the duty of every agent to keep his principal's accounts, but where an agent is entrusted with money to be used, or is engaged in a transaction which requires expenditures or involves collections or receipts, and the like, it is his duty to keep and be prepared to render true and correct accounts of his transactions.[74] Where it is conceded or shown that money or property came into his hands, the burden is on him to show what he did with it, and he cannot expect to satisfy his duty merely by general assertions that it was properly expended or disposed of: he must be prepared to account for it, and to produce the usual vouchers or other evidence.[75] Where he claims to be reimbursed for expenditures, he must be able to show what they were, and that they were proper in purpose and amount.[76]

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[71] See Peters v. Grim (1892), 149 Pa. 163, 24 Atl. 192, 34 Am. St. 599 (unlawful transaction wholly ended, and money in question not the proceeds of it); Repplier v. Jacobs (1892), 149 Pa. 167, 24 Atl. 194 (same); Baldwin v. Potter (1874), 46 Vt. 402, Goddard's Cas. 581; Gilbert v. American Surety Co. (1902), 57 C. C. A. 619, 121 Fed. 499, 61 L. R. A. 253.

[72] See Leonard v. Poole (1889), 114 N. Y. 371, 21 N. E. 707, 11 Am. St. R. 667, 4 L. R. A. 728; McMullen v. Hoffman (1899), 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117; Kennedy v. Lonabaugh (1911), 19 Wyo. 352, 117 Pac. 1079; Citizens Bank v. Mitchell (1909), 24 Okla. 488, 103 Pac. 720; Central Trust Co. v. Respass (1902), 112 Ky. 606, 66 S. W. 421, 99 Am. St. R. 317, 56 L. R. A. 479. Compare Mitchell v. Fish (1911), 97 Ark. 444, 134 S. W. 940.

[73] See Bernard v. Taylor (1893), 23 Oreg. 416, 31 Pac. 968, 37 Am. St. R. 693, 18 L. R. A. 859, Goddard's Cas. 582; Kiewert v. Rindskopf (1879), 46 Wis. 481, 1 N. W. 163, 32 Am. Rep. 731, Mechem's Cas. 497; Ware v. Spinney (1907), 76 Kan. 289, 91 Pac. 787, 13 L. R. A. (N. S.) 267, 13 Ann. Cas. 1181; Wasserman v. Sloss (1897), 117 Cal. 425, 49 Pac. 566, 59 Am. St. R. 209, 38 L. R. A. 176; Clarke v. Brown (1886), 77 Ga. 606, 4 Am. St. R. 98; Munns v. Commission Co. (1902), 117 Iowa 516, 91 N. W. 789; Smith v. Blachley (1898), 188 Pa. 550, 41 Atl. 619, 68 Am. St. R. 887.

The principal may, of course, waive the requirement, or show by his words or conduct that he does not expect it, but unless he does so, the rule is as stated.[77]

Doubts caused by the agent's failure to keep proper accounts will be resolved against him.[78]

§ 338. **Duty to give notice of collection.**—Upon collecting money for his principal, the agent—unless he already has instructions from the principal, or there is an established course of business, as to remitting or disposing of it, with which he may and should comply without waiting for any further instructions[79]—should give the principal notice of the collection within a reasonable time, and if he has done so, the agent cannot ordinarily be sued for the money until the principal has make a demand for it with which the agent has refused or neglected to comply.[80] If the principal has learned, through some other source, of the collection, he may, of course, demand the money without waiting to be informed by the agent, though he seems not to be obliged to do so where the agent is already in default. No demand is ordinarily necessary where it appears that the agent denies or has repudiated the agency.[81]

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[74] See Dodge v. Hatchett (1903), 118 Ga. 883, 45 S. E. 667, Goddard's Cas. 569; Chicago Title & Trust Co. v. Ward (1904), 113 Ill. App. 327; Brigham v. Newton (1901), 106 La. 280, 30 So. 849; Boyce v. Boyce (1900), 124 Mich. 696, 83 N. W. 1013; Riley v. Bank (1899), 57 S. Car. 98, 35 S. E. 535.

[75] See Webb v. Fordyce (1880), 55 Iowa 11, 7 N. W. 385; Gay v. Householder (1912), 71 W. Va. 277, 76 S. E. 450, Ann. Cas. [1914C] 297.

[76] See Moyses v. Rosenbaum (1900), 98 Ill. App. 7, Goddard's Cas. 572.

[77] See Rich v. Austin (1867), 40 Vt. 416.

[78] See Illinois Linen Co. v. Hough (1878), 91 Ill. 63, Goddard's Cas. 587.

[79] It would, of course, in many cases be the duty of the agent, either because of his instructions or of the established methods of procedure in such business, to at once *remit* the money without waiting for any further instructions. See Clark v. Moody (1821), 17 Mass. 145; Brown v. Arrott (1843), 6 Watts & Serg. (Pa.) 402.

§ 339. —— The agent will be liable for interest if he fails to give notice of the collection, or if he uses or applies the money contrary to instructions, or if he fails to pay it over upon demand.[82]

The statute of limitations will usually not begin to run in the agent's favor until he has given notice of the collection, or until a demand has been made upon him, or at least until the principal who has learned of the collection could have made a demand,[83] though the cases upon this point seem to be in some confusion.[84]

§ 340. Agent must not mix principal's funds with his own.—The agent should not mix his principal's funds with his own; if he does so and they are lost, he will be liable for their loss.[85]

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[80] See Jett v. Hempstead (1869), 25 Ark. 462, Mechem's Cas. 496; Bedell v. Janney (1847), 9 Ill. 193, Goddard's Cas. 597.

[81] See Hammett v. Brown (1877), 60 Ala. 498; Judith Transp. Co. v. Williams (1907), 36 Mont. 25, 91 Pac. 1061; Waddell v. Swann (1884), 9 N. Car. 108.

[82] See Thorp v. Thorp (1902), 75 Vt. 34, 52 Atl. 1051.

[83] See Jett v. Hempstead, *supra;* Teasley v. Bradley (1900), 110 Ga. 497, 35 S. E. 782, 78 Am. St. R. 113, Goddard's Cas. 601; Whitehead v. Wells (1874), 29 Ark. 99.

[84] See Campbell v. Roe (1891), 32 Neb. 345, 49 N. W. 452; Mast v. Easton (1885), 33 Minn. 161, 22 N. W. 253; Campbell v. Boggs (1865), 48 Pa. 524; Goodyear Rubber Co. v. Baker (1908), 81 Vt. 39, 69 Atl. 160, 17 L. R. A. (N. S.) 667, 15 Ann. Cas. 1207; Guarantee Trust Co. v. Farmers' Bank (1902), 202 Pa. 94, 51 Atl. 765.

[85] Where lawyers who had collected money for clients deposited it in their own names in a bank, pending a distribution to their respective clients, and before this was effected the bank failed, it was held that the loss must fall upon the lawyers. Naltner v. Dolan (1886), 108 Ind. 500, 8 N.

Neither should the agent mingle his principal's property with his own; if he so commingles the two that they cannot be separated, or his own can not be identified, the principal may claim the whole mass.[86]

The principal may follow and recover his money or property, so long as he can identify it, and until it comes into the hands of a bona fide holder for value and without notice.[87] As to money, which ordinarily has no "ear-mark," such a holder would usually prevail.[88] As to property of the non-negotiable

E. 289, 58 Am. Rep. 61, Mechem's Cas. 623. The court said: "In case it becomes the duty of an agent or trustee to deposit money belonging to his principal, he can escape the risk only by making the deposit in his principal's name, or by so distinguishing it on the books of the bank, as to indicate in some way that it is the principal's money. If he deposit in his own name, he will not, in case of loss, be permitted to throw such loss on his principal. In such a case the good faith or intention of the trustee is in no way involved."

See also Massachusetts L. Ins. Co. v. Carpenter (1870), 32 N. Y. Super. 734, (aff'd 49 N. Y. 668), Goddard's Cas. 589; Cartmell v. Allard (1871), 70 Ky. (7 Bush) 482, Goddard's Cas. 592.

[86] See First Nat. Bank v. Schween (1889), 127 Ill. 573, 20 N. E. 681, 11 Am. St. R. 174; Lance v. Butler (1904), 135 N. Car. 419, 47 S. E. 488.

[87] Riehl v. Evansville Foundry Ass'n (1885), 104 Ind. 70, 3 N. E. 633; Pearce v. Dill (1897), 149 Ind. 136, 48 N. E. 788; Farmers' Bank v. King (1868), 57 Pa. 202, 98 Am. Dec. 215, Mechem's Cas. 590; Baker v. New York Nat. Bank (1885), 100 N. Y. 31, 2 N. E. 452, 16 Abb. N. C. 458, 53 Am. Rep. 150, Mechem's Cas. 596; Englar v. Offutt (1888), 70 Md. 78, 16 Atl. 497, 14 Am. St. R. 332; National Bank v. Insurance Co. (1881), 104 U. S. 54, 26 L. Ed. 693; Roca v. Byrne (1895), 145 N. Y. 182, 39 N. E. 812, 45 Am. St. R. 599.

[88] Thus in Mobile, etc., Ry. Co. v. Felrath (1880), 67 Ala. 189, the court said: "The general proposition that a principal may pursue his property or his money which his agent may have misapplied, is not doubted. From the necessity of the case an exception obtains as to money or that which is a circulating medium used and employed as money. Having no 'ear-marks,'—not capable of being identified and distinguished,—if the agent misuses or misapplies it, and it passes to the possession of one, upon a valuable consideration, and without notice, it may not be reclaimed." See also Lime Rock Bank v. Plimpton (1835), 17 Pick. (Mass.) 159, 28 Am. Dec. 286; Burnham v. Holt (1843), 14

class, even such a holder could not ordinarily defeat the principal's claim.[89]

§ 341. **Form of action.**—The form of action in which the agent's duty to account may be enforced will usually depend upon the circumstances. In many cases an action for the breach of an express or implied contract to pay or deliver would be appropriate.[90] If the agent has received money which it is his duty to pay or account for to the principal, an action for money had and received may be maintained.[91] As has been seen, if an agent applies his principal's money or property to an end or purpose not authorized, he may often be held liable for a conversion.[92] Specific goods may often be recovered by an action

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N. H. 367; Porter v. Roseman (1905), 165 Ind. 255, 74 N. E. 1105, 112 Am. St. R. 222, 6 Ann. Cas. 718.

But a bank in which an agent deposits his principal's money in his own name is merely a debtor, not a purchaser for value. Roca v. Byrne, *supra;* and where the bank has notice that the deposit belongs to the principal, it may not, with the agent's consent, apply it in payment of the agent's debt to the bank. Baker v. New York Nat. Bank, *supra.*

[89] See Barker v. Dinsmore (1872), 72 Pa. 427, 13 Am. Rep. 697; Saltus v. Everett (1838), 20 Wend. (N. Y.) 267, 32 Am. Dec. 541; Edwards v. Dooley (1890), 120 N. Y. 540, 24 N. E. 827; Anderson v. Patten (1912), 157 Iowa 23, 137 N. W. 1050; Stevenson v. Kyle (1896), 42 W. Va. 229, 24 S. E. 886, 57 Am. St. R. 854.

[90] See Greentree v. Rosenstock (1875), 61 N. Y. 583; Conaughtey v. Nichols (1870), 42 N. Y. 83.

[91] See Guernsey v. Davis (1903), 67 Kan. 378, 73 Pac. 101; Gordon v. Hostetter (1867), 37 N. Y. 99, 4 Abb. Prac. (N. S.) 263.

[92] See Laverty v. Snethen (1877), 68 N. Y. 522, 53 How. Prac. 152, 23 Am. Rep. 184, Mechem's Cas. 486; Bartels v. Kinninger (1898), 144 Mo. 370, 46 S. W. 163, Goddard's Cas. 595; Wells v. Collins (1889), 74 Wis. 341, 43 N. W. 160, 5 L. R. A. 531; Salem, etc., Co. v. Anson (1902), 41 Oreg. 562, 67 Pac. 1015, 69 Pac. 675; Chase v. Baskerville (1904), 93 Minn. 402, 101 N. W. 950; Bridgeport Organ Co. v. Snyder (1908), 147 N. Car. 271, 61 S. E. 51; Comley v. Dazian (1889), 114 N. Y. 161, 21 N. E. 135; Britton v. Ferrin (1902), 171 N. Y. 235, 63 N. E. 954.

Failure to turn over the *identical* money or thing received will or will not be a conversion, depending upon the duty. It may be the duty of a mere servant or special agent to turn over the very thing he received; or, as in the case of a general sales or col-of replevin.[93]

Law and not equity is usually the forum, but where the agent's duties are fiduciary in character and involve a dealing with trust funds, an action in equity for an accounting may be maintained.[94] So also may it where the accounting would be so complicated and involved that it could not be settled at law without great difficulty,[95] and, ordinarily, where third persons also were sought to be held liable as trustees of the principal's property or money.

6. *To give Notice to his Principal.*

§ 342. Duty to give notice of material facts coming to his knowledge.—It is the duty of the agent to give the principal timely notice of all facts coming to the agent's knowledge, relating to the subject matter of the agency, which it is material for the principal to know for the protection of his interests, and which the agent can and may communicate to him.[96]

This duty may present itself under a great variety of circumstances. Thus the duty of loyalty, as has been seen, may require

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lection agent, to pay over the *amount* collected but not in the identical money received. Compare Hazelton v. Locke (1908), 104 Me. 164, 71 Atl. 661, 20 L. R. A. (N. S.) 35, 15 Ann. Cas. 1009; Farrelly v. Hubbard (1896), 148 N. Y. 592, 43 N. E. 65; Vandelle v. Rohan (1901), 36 N. Y. Misc. 239, 73 N. Y. Supp. 285.

In Walter v. Bennett (1857), 16 N. Y. 250, it is said: "The duty of an agent for sale is to account for the proceeds of his principal's property, but he is not guilty of a conversion if he does not deliver the specific proceeds to his principal."

[93] See Terwilliger v. Beals (1872), 6 Lans. (N. Y.) 403.

[94] See Moxon v. Bright (1869), L. R. 4 Ch. App. 292; Marvin v. Brooks (1883), 94 N. Y. 71; Dillman v. Hastings (1891), 144 U. S. 136, 12 Sup. Ct. 662, 36 L. Ed. 378; Warren v. Holbrook (1893), 95 Mich. 185, 54 N. W. 712, 35 Am. St. R. 554.

[95] See Taylor v. Tompkins (1876), 49 Tenn. (2 Heisk.) 89.

[96] See Devall v. Burbridge (1842), 4 Watts & Serg. (Pa.) 305, Mechem's Cas. 499; Clark v. Bank of Wheeling (1851), 17 Pa. 322, Goddard's Cas. 600; Brown v. Arratt (1843), 6 Watts & Serg. (Pa.) 402; Emerson v. Turner (1910), 95 Ark. 597, 130 S. W. 538; Dorr v. Camden (1904), 55 W. Va. 226, 46 S. E. 1014, 65 L. R. A. 348; Hegenmyer v. Marks (1887), 37 Minn. 6, 32 N. W. 785, 5 Am. St. R. 808.

the agent to disclose to his principal any interests or engagements which the agent may have, either on his own account or for other persons, which may disqualify him for loyal devotion to the principal's interests.

If he has undertaken to care for, protect or represent the principal's property or interests, and such property or interests are attacked or threatened or imperiled by hostile forces or impending dangers or wrongful acts, it would ordinarily be the agent's duty to inform the principal, so that he may take such steps as he desires to protect his interests. If the agent finds himself unable or unwilling to carry out undertakings for which the principal depends upon him, he should give the principal timely notice, that he may make other arrangements. If debts which were to be paid to him are not paid, if deliveries which were to be made to him are not made, if notices, demands, waivers, permissions, and the like which should come to him do not come or if those which should not come do come,—in these and a great variety of similar cases, he should give the principal timely notice.

§ 343. —— This duty of giving notice is not only important in itself, but it furnishes the foundation for the rule, hereafter to be considered,[97] that notice to the agent is notice to the principal.

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[97] See *post* § 486.

CHAPTER XIII.

OF THE DUTIES AND LIABILITIES OF THE AGENT TO THIRD PERSONS.

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397. Agent liable for his negligent acts in performing his agency.
398. Agent not liable to third persons in tort for breach of duty owing to principal alone.
399. Agent not liable to third person for not undertaking service in which third person interested.
400. Agent not liable to third persons where neither he nor his principal owed them a duty.
401. Agent's liability for nonfeasance or misfeasance.
402. How sued—Joinder.

§ 344. In general.—The ordinary purpose of the agent is to bring his principal into relations with third persons, to create rights and obligations between them, or to affect, modify, perform or extinguish rights and obligations existing between them, but not to bind or obligate himself. He may, however, so conduct himself—usually unintentionally but sometimes by design—as to incur such a liability. This liability, under varying circumstances, may be either (1) in contract or (2) in tort.

I. Liability in Contract Cases.

§ 345. Agent ordinarily not personally liable on authorized contract made in principal's name.—Before proceeding to discuss the cases in which the agent may incur a personal liability, it is worth while to recall to mind the general rule of normal agency, which is, that, where a contract is made by an authorized agent in the name and on the account of a competent principal, the agent ordinarily incurs no personal liability upon or with reference to that contract. The agent may, of course, expressly guarantee or endorse, or become surety upon, the principal's contract, but unless he does so, he does not, merely by making it for his principal, guarantee either that the principal will perform his contract or that he can perform it. Neither does he by implication guarantee the honesty, solvency or good faith of his principal, or the legal sufficiency or validity of the contract.

The same rule applies also to the collateral promises, undertakings and similar acts of the agent made in good faith, in the name of the principal, and within the scope of the agent's authority.

§ 346. Rules here to be stated assume normal legal capacity of agent.—It must also be kept in mind that the rules hereinafter stated as to the cases in which an agent *may* incur a personal liability, ordinarily assume that the agent is of normal legal capacity. Thus though an agent may be personally liable if he pledges his own personal responsibility or by implication warrants his authority, and the like, that result might not follow if the agent, in the particular case, were an infant, an insane person, a married woman at common law, or a corporation acting *ultra vires*.

Attention may now be directed to the cases in which the agent may make himself liable to third persons.

§ 347. What cases of liability may occur.—The agent may make himself liable to third persons in contract cases either—

(1) Where he makes a contract for a disclosed principal but without authority;

(2) Where he contracts in the name of a principal having no legal existence;

(3) Where, though authorized to bind his principal, he pledges his personal responsibility;

(4) Where he has obtained money for his principal from the third person;

(5) Where he has received money from his principal for the third person.

Each of these cases will be separately considered.

1. *Where he makes a Contract for a disclosed Principal but without Authority.*

§ 348. Basis of liability.—A person who, without attaching any qualifications, assumes as agent for another to make a contract with a third person, thereby impliedly if not expressly represents that he is in fact authorized by his principal to make the contract as he does; and if it proves to be unauthorized the assumed agent will be liable to the third person for the loss sustained by the latter from the failure of the contract because of the lack of the assumed authority.

This representation is ordinarily one of fact and not of law,[1] but of facts which are usually more fully within the actual or potential knowledge of the agent than of the third person.

§ 349. How lack of authority may arise.—The agent's lack of authority may result either, *first*, because he never possessed it; *second*, because once having had it, it has since expired; or, *third*, because, while having some authority, or authority to perform the given act in a certain way, he has exceeded his authority, or failed to observe the conditions prescribed.

The first of these cases, *i. e.*, that in which the authority was never conferred, is doubtless the simplest one. The principal may have intended to confer it, he may have promised to confer it, he may have attempted to confer it, but, by the hypothesis, he never did confer it.

The agent may believe, on what would ordinarily seem plausible grounds, that he has the authority, as where he receives what purports to be a genuine power of attorney but which proves to be a forgery; but his belief alone will not save him.

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[1] See Beattie v. Lord Ebury (1868), L. R. 7 Ch. App. 777; Abeles v. Cochran (1879), 22 Kan. 405, 31 Am. Rep. 194; Holt v. Winfield Bank (1885), 25 Fed. 812; Michael v. Jones (1884), 84 Mo. 578; McReavy v. Eshelman (1892), 4 Wash. 757, 31 Pac. 35; Walker v. Bank of New York (1854), 9 N. Y. 582, Seld. Notes 257.

An authority once existing may have ceased to exist for a variety of reasons: the principal may have revoked it; it may have been terminated by the principal's death, or bankruptcy, or marriage, or, perhaps, insanity; changes of the law, destruction of the subject-matter, sale of the subject-matter, and the like, may have terminated it,[2] and of this termination the agent may in fact have been ignorant, but here again his ignorance would not necessarily save him.

§ 350. **What forms present themselves.**—The question of liability for acting without authority may arise in one of four classes of cases:

1. Where an agent erroneously believing himself authorized, makes an express representation as to his authority.
2. Where an agent, knowing that he is not authorized, makes an express representation as to his authority.
3. Where an agent, erroneously believing himself authorized, makes no express representation, but assumes to act as one having authority.
4. Where an agent, knowing that he has no authority, makes no express representation, but assumes to act as one authorized.

§ 351. **Liability of agent.**—In all of these cases the agent will be liable to the third person with whom he deals for the injury which such person naturally and proximately sustains by reason of the act's being unauthorized.

For the case in which the agent expressly or by implication represents that he has authority when he knows he has none, the common law action of deceit ordinarily furnishes an adequate remedy.[3]

§ 352. —— **Implied warranty of authority.**—But it is not at all necessary to the liability of the agent that he should have acted in bad faith, although that fact may affect the form or the extent of his liability. Even where in good faith he believes he has authority to make the contract, but has not, he may nevertheless be held liable. For this case, what has been termed the "brilliant fiction" of an "implied warranty of authority" has been invented, in pursuance of which the agent may be held liable in many cases to which the doctrine of deceit would not extend.[4]

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[2] See *ante* § 183, *et seq.*

[3] See Polhill v. Walter (1832), 3 B. & Ad. 114, Wambaugh's Cas. 496.

The agent who makes no reservations to the contrary is held to promise that his representation of authority is true in fact, and for this promise the consent of the other party to deal with him as agent supplies the consideration.[5]

§ 353. **In what form of action liable.**—The liability of the agent may, therefore, according to the facts, be enforced either in an action of tort or of contract.

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[4] See Collen v. Wright (1857), 8 El. & Bl. 647, Wambaugh's Cas. 506; Oliver v. Bank of England [1902], 1 Ch. 610; Sheffield Corporation v. Barclay [1905], App. Cas. 392; Bank of England v. Cutler [1908], 2 K. B. 208; Blower v. Van Noorden [1909], Transv. L. R. (S. C.) 890; Rederi Aktiebolaget Nordstjernan v. Salvesen (1903), 6 Ct. Sess. Cas. (5th Series) 64; Maneer v. Sanford (1904), 15 Manitoba 181; Russell v. Koonce (1889), 104 N. Car. 237, 10 S. E. 256; Kroeger v. Pitcairn (1882), 101 Pa. 311, 47 Am. Rep. 718, Mechem's Cas. 501, Wambaugh's Cas. 509; Farmers' Trust Co. v. Floyd (1890), 47 Ohio St. 525, 26 N. E. 110, 21 Am. St. R. 846, 12 L. R. A. 346; Anderson v. Adams (1903), 43 Oreg. 621, 74 Pac. 215; Oliver v. Morawetz (1897), 97 Wis. 332, 72 N. W. 877.

[5] Thus in Collen v. Wright, *supra*, it is said. "The obligation arising in such a case is well expressed by saying that a person professing to contract as agent for another impliedly if not expressly undertakes to or promises the person who enters into such contract upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist. The fact of entering into the transaction with the professed agent as such is good consideration for the promise."

The doctrine is not confined to the cases in which the act of the other party is the making of a contract. It may operate as an agreement to indemnify the other party against loss resulting from the doing of some other act, demandable if the agent had the authority he assumed to have, but not demandable if he had not that authority. See Sheffield Corporation v. Barclay [1905], App. Cas. 392.

Where the agent, knowing that he is unauthorized, has made express representations as to his authority; and also where he has assumed to act, knowing that he is unauthorized, an action on the case for the deceit is an appropriate remedy.

Where, however, the agent acted in good faith, an action based upon the express or implied warranty of authority would be the appropriate remedy.

And even in the former cases where the action for deceit might be maintained, the party injured may, at his option, ignore or waive the element of deceit and base his action upon the express or implied warranty.[6]

§ 354. When liable on the contract itself.

—It has sometimes been held that an agent who makes a contract without authority is liable upon the contract itself, as though originally made by him as principal; but the better rule is that the agent is liable on the contract itself only in those cases in which the contract contains apt words to bind him personally, or in which he has pledged his personal responsibility.[7] In other cases the action should be, not on the contract, but on the express or implied warranty of authority, or for the deceit.

§ 355. Limitations—Agent may limit his implied representation.

—Since the basis of the doctrine of the agent's implied representation of authority is found in the fact that the agent's assumption to act *as* agent ordinarily involves a representation that he *is* agent, and that the factual foundation of this representation is usually more completely within the actual or potential knowledge of the agent than of the third person with whom he assumes to deal, it is obvious that the agent may alter the basis of the dealing by openly limiting the representation which he makes. Thus he may expressly disclaim responsibility and leave the other party to decide for himself;[8] he may use words whose known significance is to limit his responsibility in a certain way;[9] or, without making any express representation, he may fully and fairly lay all the facts concerning his authority before the other party so that he may decide for himself.[10] In such a case the other party cannot claim to have been misled by the agent's representations, and the agent will not be liable.

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[6] See White v. Madison (1862), 26 N. Y. 117, 26 How. Prac. 481; Seeberger v. McCormick (1899), 178 Ill. 404, 53 N. E. 340.

Compare Gilmore v. Bradford (1890), 82 Me. 547, 20 Atl. 92.

[7] See Ballou v. Talbot (1820), 16 Mass. 461, 8 Am. Dec. 146, Wambaugh's Cas. 494; Patterson v. Lippincott (1885), 47 N. J. L. 457, 54 Am. Rep. 178, Mechem's Cas. 507, Wambaugh's Cas. 514; Haupt v. Vint (1911), 68 W. Va. 657, 70 S. E. 702, 34 L. R. A. (N. S.) 518, Goddard's Cas. 657; Hancock v. Yunker (1876), 83 Ill. 208, Goddard's Cas. 659; Taylor v. Nostrand (1892), 134 N. Y. 108, 31 N. E. 246; Cole v. O'Brien (1892), 34 Neb. 68, 51 N. W. 316, 33 Am. St. R. 616; American Surety Co. v. Morton (1912), 32 Okla. 687, 122 Pac. 1103, 39 L. R. A. (N. S.) 702; Simmonds v. Long (1909), 80 Kan. 155, 101 Pac. 1070, 23 L. R. A. (N. S.) 553.

In North Dakota, under the code, see Kennedy v. Stonehouse (1904) 13 N. Dak. 232, 100 N. W. 258.

§ 356. —— So to make the agent liable in any case, the contract must be one which would have been of some legal value against the principal if the agent had been authorized to make it. If the contract, though authorized, would have been *void*, or entirely *illegal*, the other party can not ordinarily sustain a legal loss by its failure.[11] Neither could he, ordinarily, where the contract could not be enforced because of some defect or disability in the other party himself.[12]

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[8] See Halbot v. Lens [1901], 1 Ch. 344.

[9] As where the agent signed, adding the words "by telegraphic authority of" a named principal, which words, in that market, were habitually used to show that the agent did not assume responsibility for the correctness of the telegram. Lilly v. Smales, [1892] 1 Q. B. 456, Wambaugh's Cas. 524.

[10] See Newport v. Smith (1895), 61 Minn. 277, 63 N. W. 734; Thilmany v. Iowa Paper Bag Co. (1899), 108 Iowa 357, 79 N. W. 261, 75 Am. St. R. 259, Goddard's Cas. 661; Kansas Nat. Bank v. Bay (1901), 62 Kan. 692, 64 Pac. 596, 84 Am. St. R. 417, 54 L. R. A. 408; Dillon v. MacDonald (1901), 21 New Zeal. 45; Blower v. Van Noorden [1909], Transv. L. R. (S. C.) 890.

[11] See Dung v. Parker (1873), 52 N. Y. 494; Baltzen v. Nicolay (1873), 53 N. Y. 467; where contract would have been *void* under the statute of frauds; if it were simply voidable and had not been avoided, it might nevertheless be of value. See McCarthy v. Young (1898), 19 Australian L. Times 231); Merchants', etc., Packet Co. v. Streuby (1907), 91 Miss. 211, 44 So. 791, 124 Am. St. R. 651, (contract illegal, *i. e.* an *ultra vires* one).

If the contract as made was merely voidable but not void, no substantial damages at any rate could ordinarily be recovered until the alleged principal had disaffirmed or repudiated the contract.[13]

§ 357. —— There is ordinarily no implied warranty by the agent that the *principal* has authority to make the contract. "He simply covenants that he has authority to act for his principal, not that the act of the principal is legal and binding."[14]

§ 358. **The measure of damages.**—The damages to be recovered against the agent for acting without authority must, in general, be compensation for the loss which the other party has naturally and proximately sustained by reason of the false assertion of authority. In the case of a contract, the measure will usually be compensation for the loss sustained by not obtaining a then binding contract.[15] In the case of other acts than the making of a contract, it will be compensation for the loss naturally and proximately resulting from the fact that the other party has done, upon the demand of the agent and in reliance upon his implied assertion of the right or title to demand it, an act which would have been justified if that right or title had existed, but which, because of the lack of that justification, has subjected him to the loss in question.[16]

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[12] See Kent v. Addicks (1903), 60 C. C. A. 660, 126 Fed. 112, Writ of Certiorari denied 192 U. S. 607, 24 Sup. Ct. 851, 48 L. Ed. 585.

[13] See Patterson v. Lippincott (1885), 47 N. J. L. 457, 1 Atl. 506, 54 Am. Rep. 178, Mechem's Cas. 507, Wambaugh's Cas. 514.

[14] See Thilmany v. Iowa Paper Bag Co., *supra.*

[15] See Meek v. Wendt (1888), 21 Q. B. Div. 126, Wambaugh's Cas. 521; Firbank's Exs. v. Humphreys (1886), 18 Q. B. Div. 54, Wambaugh's Cas. 517; Anderson v. Adams (1903), 43 Oreg. 621, 74 Pac. 215; Farmers' Trust Co. v. Floyd (1890), 47 Ohio St. 525, 26 N. E. 110, 21 Am. St. R. 846, 12 L. R. A. 346.

[16] See Oliver v. Bank of England, [1901] 1 Ch. 652, [1902] 1 Ch. 610, [1903] App. Cas. 114.

§ 359. —— In the case of a contract, the measure *may* be the same as that of the liability of the principal if he had not performed an authorized contract of the same sort; but it is not necessarily so.

Thus if the principal subsequently became insolvent, the damages which might be assessed against him would not necessarily be the same as those which might be recovered of the agent, since the agent does not, by implication, guarantee either the solvency of his principal or his performance of the contract.[17]

The costs and expenses of an action to determine whether the contract can be enforced against the principal, may usually be recovered as damages wherever such an action can be deemed to have been fairly and reasonably brought.[18]

§ 360. Effect of ratification.—It must be kept in mind in dealing with this question, that, as has been seen in a preceding chapter,[19] the agent's lack of authority at the time may often be cured by the subsequent ratification of the principal; and that such subsequent ratification will often relieve the agent of his liability to the other party for having acted without authority.[20]

This would probably not be true if and where ratification by a wholly undisclosed principal were permitted.

2. *Where there was no responsible Principal.*

§ 361. Agent liable if no principal in existence.—For reasons analogous to those referred to in the preceding sections, one who assumes to act as agent for a principal having no legal existence—as, for example, a committee, a voluntary society, a proposed corporation not yet created, an alleged corporation whose corporate existence has failed or expired, and the like—may often be held personally liable.

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[17] See Simons v. Patchett (1857), 7 El. & Bl. 568.

[18] See White v. Madison (1862), 26 N. Y. 117, 26 How. Prac. 481; Kennedy v. Stonehouse (1904), 13 N. Dak. 232, 100 N. W. 258, 3 Ann. Cas. 217; Oliver v. Bank of England, *supra*.

[19] See Chap. VI.

[20] See *ante*, § 163.

§ 362. Inchoate corporations.—One of the cases most frequently arising is that of the corporation contemplated but not yet legally created. Such a body, in the nature of the case, can make no present contract and can have no present agent. What are termed continuing offers may be made, which may be accepted by the corporation when it comes into existence, and thus result in the formation of a contract.

If, on the other hand, any *present contract* is to be made, the corporation cannot be a party to it.[21] It must bind the promoter or other pretended agent, if it is to bind anybody.[22] It may be that it binds nobody. If it then bound the agent, he could be released, when the corporation came into existence, by a novation. Some courts hold that the corporation may "adopt" the contract.[23]

Where one assumes to act as agent for a proposed corporation and the other party knows that it is not yet in existence, no implied warranty of authority, or of the existence of the principal, would arise. Both parties know that it is not true.

If, though the agent knew the facts, the other party did not, and the agent assumed to act as for a then existing principal, such a warranty might arise.[24]

If, though the corporation had come into existence, there was some legal condition or requirement not complied with which in fact incapacitated it to make the contract, and the other party was ignorant of this, an agent who assumed to act for it as a presently competent principal, would usually be liable.[25]

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[21] See Penn Match Co. v. Hapgood (1886), 141 Mass. 145, 7 N. E. 22; Carmody v. Powers (1886), 60 Mich. 26, 26 N. W. 801; 19 Harvard Law Review 97.

[22] See Kelner v. Baxter (1866), L. R. 2 C. P. Cas. 174, Wambaugh's Cas. 1016.

[23] See Battelle v. Pavement Co. (1887), 37 Minn. 89, 33 N. W. 327; McArthur v. Times Printing Co. (1892), 48 Minn. 319, 51 N. W. 216, 31 Am. St. R. 653; Oakes v. Cattaraugus Water Co. (1894), 143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544.

[24] See Lagrone v. Timmerman (1895), 46 S. Car. 372, 24 S. E. 290.

[25] See Seeberger v. McCormick (1899), 178 Ill. 404, 53 N. E. 340; Farmers Trust Co. v. Floyd (1890), 47 Ohio St. 525, 26 N. E. 210, 21 Am. St. R. 846, 12 L. R. A. 346.

§ 363. Unincorporated societies and associations.—Somewhat similar questions arise respecting unincorporated clubs, societies, lodges and other associations, not partnerships. Such societies, not being legal entities, cannot as such have agents, though all or part of the members may unite to have an agent.

One who assumed to act as agent for such an association would not by implication warrant its legal existence or capacity to one who knew the facts; though he might so act as to incur that liability to one who did not know the facts.

In many cases, a personal liability for contracts made by those acting for such groups is based upon a ground later to be considered, namely, that, because of the unsatisfactory character of such groups as parties to a contract, it is open to find as a fact that the credit was extended to the agents personally, where they have not expressly excluded that liability.[26]

§ 364. Public meetings, committees, etc.—What was said above applies all the more strongly to such temporary and evanescent groups as public meetings, committees, and the like. Personal liability of those who assume to represent such groups is frequently based upon the reasonableness of finding that the credit was extended to the alleged agents personally, rather than to the elusive principals whom they claim to have represented.[27]

§ 365. Existing principal legally disqualified.—Somewhat similar are the cases wherein, though the alleged principal exists, he is subject to some legal disability. Such is the case of the infant principal. If the other party knew he was an infant, he could not assert an implied warranty to the contrary. If the other party did not know it, it is held that there is no breach of an implied warranty until the infant principal disaffirms the contract on that ground,[28] which, perhaps, he may never do.

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[26] See Ash v. Guie (1881), 97 Pa. 493, 39 Am. Rep. 818, Mechem's Cas. 45; Lewis v. Tilton (1884), 64 Iowa 220, 19 N. W. 911, 52 Am. Rep. 436, Mechem's Cas. 510; Codding v. Munson (1897), 52 Neb. 580, 72 N. W. 846, 66 Am. St. R. 524, Goddard's Cas. 667; Fredendall v. Taylor (1868), 23 Wis. 538, 99 Am. Dec. 203; Winona Lumber Co. v. Church (1895), 6 S. Dak. 498, 62 N. W. 107; Clark v. O'Rourke (1896), 111 Mich. 108, 69 N. W. 147, 66 Am. St. R. 389.

[27] See Eichbaum v. Irons (1843), 6 Watts & S. (Pa.) 67, 40 Am. Dec. 540, Goddard's Cas. 665; Codding v. Munson, *supra;* Blakely v. Bennecke (1875), 59 Mo. 193; Steele v. McElroy (1853), 33 Tenn. (1 Sneed) 341.

In the case of the married woman at common law, whose contract was not voidable but void, there would doubtless be a liability on the part of her assumed agent to one who was ignorant of her status.[29]

§ 366. Principal dead at time of contract.—Where there has been a competent principal, but, without the knowledge of either party, he is dead at the time of making the contract, it was formerly held that the agent, not being guilty of any wrong, was not liable;[30] but later cases have held that the doctrine of implied warranty would apply to such a case.[31] It certainly would, if the agent knew of the death but the other party did not.

3. *Where Agent pledges his personal Responsibility.*

§ 367. In general.—The foregoing subdivision deals with the cases in which the agent incurs a personal liability by assuming to act without adequate authority. But that is not the only case. The agent may also make himself liable in many cases where, though he was authorized to make the particular contract in question, he makes it in such a manner as not to bind the principal.

What these cases are, is here to be considered. They will usually be found to arise under one or the other of two general situations: 1. Where though adequately authorized, he conceals the existence or the identity of his principal. 2. Where though adequately authorized, and disclosing both the existence and the identity of his principal, he nevertheless pledges his own responsibility.

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[28] See Patterson v. Lippincott (1885), 47 N. J. L. 457, 1 Atl. 506, 54 Am. Rep. 178, Mechem's Cas. 507, Wambaugh's Cas. 514.

[29] See Edings v. Brown (1845), 1 Rich. (S. Car.) 255.

[30] See Smout v. Ilbery (1842), 10 Mees. & Wels. 1, Goddard's Cas. 653, Wambaugh's Cas. 499.

[31] See Yonge v. Toynbee [1910], 1 K. B. 215.

§ 368. Effect of not disclosing existence or name of principal.—For the obvious reason that he discloses no one else to be bound and must be presumed to intend to bind some one, the agent who conceals the fact of his agency, and contracts as the ostensible principal, will ordinarily be personally liable.[32]

So he will be generally where, though the fact of the agency is disclosed, he conceals the name and identity of his principal; although this case is not so clear. It is not impossible to contract with an unknown but existing person; and the agent may so frame his contract as to bind only this person if any one, as where he expressly states that he contracts "for and on account of owner," though he does not name him.[33] But for the ordinary case, if the agent, though known to be one, conceals the name and identity of his principal and contracts in his own name without limiting his liability, he will be personally liable upon the contract.[34]

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[32] See Davenport v. Riley (1822), 2 McCord. (S. Car.) 198, Wambaugh's Cas. 659; Murphy v. Helmrich (1884), 66 Cal. 69, 4 Pac. 958, Goddard's Cas. 670; Cochran v. Rice (1910), 26 S. Dak. 393, 128 N. W. 583, Ann. Cas. 1913B, 570, Goddard's Cas. 672; Winsor v. Griggs (1849), 59 Mass. (5 Cush.) 210, Goddard's Cas. 673; Holt v. Ross (1873), 54 N. Y. 472, 13 Am. Rep. 615, Goddard's Cas. 674; Amans v. Campbell (1897), 70 Minn. 493, 73 N. W. 506, 68 Am. St. R. 547; Patrick v. Bowman (1892), 149 U. S. 411, 13 Sup. Ct. 811, 866, 37 L. Ed. 790.

[33] See Pike v. Ongley (1887), 18 Q. B. Div. 708, Wambaugh's Cas. 662; Gadd v. Houghton (1876), 1 Exch. Div. 357, Wambaugh's Cas. 578; Waddell v. Mordecai (1836), 3 Hill (S. Car.) L. 22; Lyon v. Williams (1856), 71 Mass. (5 Gray) 557.

[34] See Nichols v. Weil (1900), 30 Misc. 441, 62 N. Y. Supp. 477, Goddard's Cas. 674; Holt v. Ross, *supra;* Landyskowski v. Lark (1896), 108 Mich. 500, 66 N. W. 371; Dockarty v. Tillotson (1902), 64 Neb. 432, 89 N. W. 1050; McClure v. Central Trust Co. (1900), 165 N. Y. 108, 58 N. E. 777, 53 L. R. A. 153; Neely v. State (1894), 60 Ark. 66, 28 S. W. 800, 46 Am. St. R. 148.

No particular method of disclosing the principal is essential;[35] but the burden, in general, is upon the agent to make the disclosure, not upon the other party to discover it.[36]

§ 369. —— This liability arises ordinarily in view of the situation at the time of making the contract. An agent therefore who would escape personal responsibility under this rule must disclose his principal at the time of making the contract, and the subsequent disclosure of the principal will not be sufficient to relieve the agent.[37]

In many of these cases wherein the principal is undisclosed, the principal himself, as will be seen hereafter,[38] may also be held liable when discovered; but the fact that he may be held responsible does not relieve the agent; it simply gives the other party an option to pursue the one or the other as he pleases.

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[35] Thus he may be pointed out or otherwise identified. See Mercer v. Leihy (1905), 139 Mich. 447, 102 N. W. 972, Goddard's Cas. 676.

[36] See Cobb v. Knapp (1877), 71 N. Y. 348, 27 Am. Rep. 51; Baldwin v. Leonard (1867), 39 Vt. 260, 94 Am. Dec. 324; Holt v. Ross, *supra*.

The mere fact that one is the sort of person who usually acts as agent for another, is not of itself enough; he *may* in the given case be acting for himself. Thus the mere fact that one is auctioneer or broker or factor or an express company, is not enough. See Holt v. Ross, *supra;* Argersinger v. McNaughton (1889), 114 N. Y. 535, 21 N. E. 1022, 11 Am. St. R. 687; Mills v. Hunt (1837), 17 Wend. (N. Y.) 333, 20 *id.* 431; Hamlin v. Abell (1894), 120 Mo. 188, 25 S. W. 516; Meyer v. Redmond (1912), 205 N. Y. 478, 98 N. E. 906, 41 L. R. A. (N. S.) 675.

Actual knowledge by the other party of the agency would, of course, suffice. See Forrest v. McCarthy (1899), 30 N. Y. Misc. 125, 61 N. Y. Supp. 853; Chase v. Debolt (1845), 7 Ill. 371; Warren v. Dickson (1862), 27 Ill. 115; Boston & Me. R. Co. v. Whitcher (1861), 83 Mass. (1 Allen) 497.

So would facts equivalent to knowledge or in view of which the other party could not reasonably believe that the agent was pledging his own credit where he had not expressly pledged it. See Johnston v. Armstrong (1892), 83 Tex. 325, 18 S. W. 594, 29 Am. St. R. 648; Alexander, etc., Lumber Co. v. McGeehan (1905), 124 Wis. 325, 102 N. W. 571; Drake v. Pope (1906), 78 Ark. 327, 95 S. W. 774.

[37] See Cobb v. Knapp, *supra*.

At any time before the contract is closed will suffice: Brackenridge v. Claridge (1898), 91 Tex. 527, 44 S. W. 819, 43 L. R. A. 593.

[38] See *post* § 465.

§ 370. —— The converse of the rule laid down in the preceding sections is, of course, true. If the agent makes a full disclosure of the fact of his agency and of the name of his principal, and contracts only as agent and for the principal so disclosed, he incurs no personal responsibility.

§ 371. **Agent may intentionally pledge his own credit.**—An authorized agent acting for a disclosed principal may pledge his own credit, either intentionally or unintentionally. Thus the other party, who, of course, may propose such terms for dealing as he chooses, may say to the agent, "I will not trust your principal, but I will trust you," and the agent, feeling sure that his principal will protect him, may assent, and bind himself to the other party.[39] In this case the agent will be liable upon the contract, and the principal will not be. There was then and there an election to deal with the agent only.

Or the other party may say to the agent, "I will not trust your principal alone, but I will trust him if you also will join in the contract, either as joint maker or surety," and the agent may assent to this, in which case both principal and agent will be bound, according to the form of the contract.[40]

§ 372. **Agent may unintentionally pledge his own credit.**—An authorized agent, acting for a disclosed principal, may unintentionally or inadvertently pledge his own credit. Thus, though he intended to bind the principal, he may sign a written contract in his own name, not using words indicating his agency, in which case the so-called parol evidence rule will prevent his showing by parol to relieve himself of liability that it was not the intention to bind himself.[41] In many such cases, the principal also might be held at the option of the other party.

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[39] See Jones v. Gould (1910), 200 N. Y. 18, 92 N. E. 1071, 200 N. Y. 554, 94 N. E. 1095; Sadler v. Young (1909), 78 N. J. L. 594, 75 Atl. 890; Carroll v. Bowen (1910), 113 Md. 150, 77 Atl. 128.

[40] See Dahlstrom v. Gemunder (1910), 198 N. Y. 449, 92 N. E. 106, 19 Ann. Cas. 771; Shordan v. Kyler (1882), 87 Ind. 38; Calder v. Dobell (1871), L. R. 6 C. P. 486, Wambaugh's Cas. 564; Wilder v. Cowles (1868), 100 Mass. 487; Rondquist v. Higham (1885), 33 Minn. 490, 24 N. W. 190.

So in executing a promissory note, for example, the agent may say "I promise," and sign "A. agent," or "A. agent of P.," and the like, supposing he thereby binds the principal, only to find that, under the rules of law, such additions as "agent," "agent of P.," and the like, are usually treated merely as *descriptio personae*.[42] In such a case, the principal cannot usually be held upon the note.

§ 373. Agent may deal in such way that other party may then elect him as the contracting party.—An authorized agent acting for a disclosed principal may so deal that the other party, when the time comes to close the contract, may decide to take the credit of the agent (with his consent, of course), instead of that of his principal, and, if he does so, the agent will be liable and not the principal. Thus it is said in a leading case,[43] "if, at the time of the sale, the seller knows not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him alone, then, according to the cases of Addison v. Gandasequi,[44] and Paterson v. Gandasequi,[45] the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other."

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[41] Thus, see Higgins v. Senior (1841), 8 Mees. & Wels. 834, Mechem's Cas. 456, Wambaugh's Cas. 554, Goddard's Cas. 464; Cream City Glass Co. v. Friedlander (1893), 84 Wis. 53, 54 N. W. 28, 36 Am. St. R. 895, 21 L. R. A. 135; Jones v. Littledale (1837), 6 Ad. & El. 486, Wambaugh's Cas. 552.

This will be so, though he is known to be an auctioneer or broker who is usually employed in selling property as an agent for others: Meyer v. Redmond (1912), 205 N. Y. 478, 98 N. E. 906, 41 L. R. A. (N. S.) 675.

[42] See *ante* § 286; Hobson v. Hassett (1886), 76 Cal. 203, 18 Pac. 320, 9 Am. St. R. 193, Mechem's Cas. 442; Price v. Taylor (1860), 5 H. & N. 540, Wambaugh's Cas. 603; Tucker Mfg. Co. v. Fairbanks (1867), 98 Mass. 101, Wambaugh's Cas. 614; Sturdivant v. Hull (1871), 59 Me. 172, 8 Am. Rep. 409, Wambaugh's Cas. 619; Merchants' Bank v. Central Bank (1846), 1 Ga. 418, 44 Am. Dec. 665, Goddard's Cas. 460; Pratt v. Beaupre (1868), 13 Minn. 187, Goddard's Cas. 463.

[43] Thompson v. Davenport (1829), 9 B. & Cres. 78, Mechem's Cas. 547, Wambaugh's Cas. 637.

Whether the credit was thus given to the agent, rather than to the principal, is, usually, *i. e.*, where the facts are disputed, or where more than one inference may reasonably be drawn from undisputed facts, a question for the jury.[46]

§ 374. Effect as election of taking agent's contract in writ-

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[44] Addison v. Gandasequi (1812), 4 Taunt. 574, Mechem's Cas. 547, Wambaugh's Cas. 529.

[45] Paterson v. Gandasequi (1812), 15 East 62, Mechem's Cas. 545, Goddard's Cas. 738, Wambaugh's Cas. 527.

In the cases referred to a Spanish merchant who had come to London to buy goods, arranged with a firm there to open negotiations for him. This firm invited dealers to come to the firm's counting house with samples, etc., to meet the Spanish merchant, and the plaintiffs did so. There the Spanish merchant took up the negotiations, selected the goods, and arranged for the price, but when the order was given it was signed by the London firm, accepted by the sellers, and the London firm was debited by the sellers on their books, and the London firm credited the sellers upon the firm's books. The Spanish merchant obtained the goods, and, upon the failure of the London firm before payment, the sellers sought to recover the price from the Spanish merchant who had not yet paid any one for the goods. It was held to be a question for the jury whether the sellers had dealt with the London firm *as the buyers*, and upon being found by the jury that they had, it was held that the Spanish merchant was not liable to the sellers, but only to the London firm.

The sellers *might* have stipulated for the liability of the London firm *in addition* to that of the Spanish merchant, but the jury found that they took the firm's credit *instead* of his.

[46] See Paterson v. Gandasequi, *supra;* Anderson v. Timberlake (1896), 114 Ala. 377, 22 So. 41, 62 Am. St. R. 105, Goddard's Cas. 650; Cobb v. Knapp (1877), 71 N. Y. 348, 27 Am. Rep. 51; Steamship Co. v. Merchants' Desp. Transp. Co. (1883), 135 Mass. 421; Fleming v. Hill (1879), 62 Ga. 751; Whitney v. Wyman (1879), 101 U. S. 392, 25 L. Ed. 1050, Mechem's Cas. 452; Hovey v Pitcher (1850), 13 Mo. 191, Goddard's Cas. 652.

ing, etc.—It has sometimes been held that if the other party, with knowledge of the principal, takes from the agent the latter's contract in writing, this constitutes a conclusive election to deal with the agent only;[47] but the weight of authority is the other way.[48] Taking the agent's written contract is significant, but it is not conclusive. The facts may show that, while he secured the agent's credit, he had bargained for that of the principal also.

So the fact that entries or charges are made against one party or the other, does not settle the question as to whom the credit was given. Such entries are significant but not conclusive.[49]

§ 375. **Agent may so contract that it becomes a question of fact as to who is bound.**—So an agent in conducting informal negotiations, by word of mouth, letter, telegram, etc., may use expressions like, "I" will buy, pay, sell, etc., by which *he* means to say that his principal will buy, pay or sell, but which the other party, not knowing that intention, may be found reasonably to have interpreted as meaning that the agent personally will buy, pay or sell, and to have assented accordingly.[50] Whether the other party did reasonably so interpret the transaction, is, usually, a question of fact for the jury; but if only one inference may fairly be drawn the court may decide it. It will do so also where it is a question of the construction of a written instrument.

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[47] See Chandler v. Coe (1874), 54 N. H. 561, Wambaugh's Cas. 573; Ferguson v. McBean (1891), 91 Cal. 63, 27 Pac. 518, 14 L. R. A. 65; Gillig v. Lake Bigler Road Co. (1866), 2 Nev. 214.

[48] See Calder v. Dobell (1871), L. R. 6 C. P. 486, Wambaugh's Cas. 564; Byington v. Simpson (1883), 134 Mass. 169, 45 Am. Rep. 314, Mechem's Cas. 558, Wambaugh's Cas. 581; Barbre v. Goodale (1896), 28 Oreg. 465, 38 Pac. 67, 43 Pac. 378.

[49] See Meeker v. Claghorn (1871), 44 N. Y. 349, Goddard's Cas. 739; Foster v. Persch (1877), 68 N. Y. 400; Dyer v. Swift (1891), 154 Mass. 159, 28 N. E. 8.

[50] See Kirkpatrick v. Stainer (1839), 22 Wend. (N. Y.) 244, Wambaugh's Cas. 531; Williamson v. Barton (1862), 7 H. & N. 899, Wambaugh's Cas. 535; Hovey v. Pitcher (1850), 13 Mo. 191, Goddard's Cas. 652; Whitney v. Wyman (1879), 101 U. S. 392, 25 L. Ed. 1050.

§ 376. Agent of foreign principal.—It was formerly thought to be the law, and still seems to be the rule in England, that an agent who contracts for a foreign principal is himself personally liable, unless his liability be expressly excluded, because it must be presumed that credit was given to the agent rather than to the foreign and inaccessible principal; but this rule no longer prevails in this country, and the agent of a foreign principal stands upon the same ground in this respect as the agent of a domestic principal.[51]

§ 377. Presumption that principal was to be bound.—Where dealings are had with one known to be acting as the agent of a known principal, the presumption will be that credit was given to the principal, and that the principal, rather than the agent, was to be bound,[52] but this presumption may be rebutted by evidence of an intention to bind the agent personally.[53]

The burden of proof in such a case is therefore upon the person seeking to hold the agent.[54]

§ 378. Presumption stronger in case of public agent.—In the case of a public agent, the presumption that the agent was not to be personally bound is stronger than in the case of a private agent;[55] and a known public agent will only be held personally bound where the evidence is very clear of an intention so to bind him.[56] And a public agent who discloses the source of his authority, and is guilty of no fraud or misrepresentation, is not ordinarily liable upon an implied warranty of authority; because his authority is a matter of public law or record, which the other party must examine for himself.[57]

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[51] See Kirkpatrick v. Stainer (1839), 22 Wend. (N. Y.) 244, Wambaugh's Cas. 531; Maury v. Ranger (1886), 38 La. Ann. 485, 58 Am. Rep. 197; Oelricks v. Ford (1859), 64 U. S. (23 How.) 49, 16 L. Ed. 534.

For the English rule, see Elbinger Actien-Geselleschaft v. Claye (1873), L. R. 8 Q. B. 313, Wambaugh's Cas. 542.

In Victoria, see Cheong v. Lohmann [1907], Vict. L. R. 571. British Columbia: Taylor v. Davenport (1910), 14 West. L. Rep. 257.

[52] See Anderson v. Timberlake (1896), 114 Ala. 377, 22 So. 431, 62 Am. St. R. 105, Goddard's Cas. 650; Meeker v. Claghorn (1871), 44 N. Y. 349, Goddard's Cas. 739; Moline Malleable Iron Co. v. York Iron Co. (1897), 27 C. C. A. 442, 83 Fed. 66; Johnson v. Welch (1876), 42 W. Va. 18, 24 S. E. 585; Walker v. Cross (1908), 87 C. C. A. 324, 160 Fed. 372; Cass v. Lord (1920), 236 Mass. 430, 128 N. E. 716. Compare Worthington v. Cowles (1873), 112 Mass. 30, Wambaugh's Cas. 540; Alexander Lumber Co. v. McGeehan (1905), 124 Wis. 325, 102 N. W. 571.

[53] See Hovey v. Pitcher (1850), 13 Mo. 191, Goddard's Cas. 652.

[54] See Blount v. Tomlinson (1909), 57 Fla. 35, 48 So. 751.

He may, of course, charge himself expressly.

§ 379. Where supposed agent was the real principal.—Where one purports to contract as agent for a named principal, but it appears that he was himself the real principal, and used the name of that principal "as representing himself when engaged in a particular business, he cannot complain of being held if the fact happens to be discovered."[58]

4. *Where Agent has obtained Money from third Person.*

§ 380. In general.—A number of questions may arise concerning the right of a third person, who has paid money to one as agent for another, to reconsider and regain the money so paid from the one to whom as such agent it had been thus paid.

§ 381. No recovery of money properly paid to which prin-

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[55] See Knight v. Clark (1886), 48 N. J. L. 22, 2 Atl. 780, 57 Am. Rep. 534, Mechem's Cas. 434; Ogden v. Raymond (1853), 22 Conn. 379, 58 Am. Dec. 429; Hall v. Lauderdale (1871), 46 N. Y. 70; Hodgson v. Dexter (1803), 1 Cranch (U. S.) 345, 2 L. Ed. 130.

[56] As to what constitutes such evidence, see Brown v. Bradlee (1892), 156 Mass. 28, 30 N. E. 85, 15 L. R. A. 509, 32 Am. St. Rep. 430, Mechem's Cas. 454.

School Town v. Kendall (1880), 72 Ind. 91, 37 Am. Rep. 139; Moral School Twp. v. Harraison (1881), 74 Ind. 93.

[57] See McCurdy v. Rogers (1866), 21 Wis. 197, 91 Am. Dec. 468.

[58] See Isham v. Burgett (1893), 157 Mass. 546, 32 N. E. 907, Wambaugh's Cas. 656.

cipal was **entitled.**—Where a third person intentionally and voluntarily pays money to an authorized agent for a principal entitled to receive it, he cannot recover it from the agent, and the fact that the agent, in violation of his duty to his principal, has not paid the money over to the latter, does not justify a recovery of it by the third person from the agent. That is a matter for his principal.[59]

§ 382. When money voluntarily paid by mistake may be recovered.—Where a third person has, by mistake or without consideration, or by the fraud of the principal alone, voluntarily paid money to one as agent for the use of his principal (and which the third person could therefore recover from the principal), the agent will not be liable to the person paying it, if, before notice of the mistake, he has paid it over to his principal.[60] That is the very thing the payer expected him to do with it. The action should be against the principal.

If, however, before he has paid it over or changed his position to his prejudice, he is notified of the mistake, etc., and directed not to pay the money over, the case is altered. Here, if the third person could recover the money from the principal if he had received it, he is usually permitted to intercept and recover it from the agent, and if the agent pays it to the principal after such notice, the agent will ordinarily be liable notwithstanding.[61] The principal who has received it might ordinarily be held, at the option of the payer.

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[59] See Gulf City Construction Co. v. Louisville & N. R. Co. (1898), 121 Ala. 621, 25 So. 579; Huffman v. Newman (1898), 55 Neb. 713, 76 N. W. 409.

[60] See Hauenstein v. Ruh (1905), 73 N. J. L. 98, 62 Atl. 184; Lang v. Friedman (1912), 166 Mo. App. 354, 148 S. W. 992; Owen v. Cronk [1895], 1 Q. B. 265, Goddard's Cas. 688; Shepard v. Sherin (1890), 43 Minn. 382, 45 N. W. 718, Goddard's Cas. 678; Elliott v. Swartwout (1836), 35 U. S. (10 Pet.) 137, 9 L. Ed. 373; Cabot v. Shaw (1889), 148 Mass. 459, 20 N. E. 99.

[61] See Smith v. Binder (1874), 75 Ill. 492; Herrick v. Gallagher (1871), 60 Barb. (N. Y.) 566, Mechem's Cas. 512; O'Connor v. Clopton (1882), 60 Miss. 349; Gosslin v. Martin (1910), 56 Oreg. 281, 107 Pac. 957.

§ 383. —— Equivalent to a payment over, within the foregoing rules, would be a settlement with the principal upon the basis that this payment was good, or a release of securities, or the incurring of a binding obligation upon the same basis, under such circumstances that the agent would be prejudiced, by having the original payment now called in question;[62] but not a mere statement of accounts or merely placing the amount to the credit of his principal.[63]

§ 384. —— Where, however, the agency was not known, and therefore there could be no implied permission or consent to his paying it over, the agent will be liable even though he has paid the money to his principal.[64]

§ 385. **Money obtained illegally.**—An agent who has obtained money from third persons illegally, as by practicing fraud, compulsion or extortion,[65] or by joining in the fraud or other wrong of his principal, will be liable to the person paying it, although he has paid it over to his principal.

At his option, the other party might ordinarily bring his action against the principal.[66]

§ 386. **Liability where principal's right terminated after payment.**—Where money has been properly paid to the known agent of a principal then entitled to receive it, but the principal's right to keep it is later terminated,—for example, by rescission or failure of conditions—it is generally held that an action for its recovery must be brought against the principal, and not against the agent, even though the agent has not yet paid it over.[67] It became the principal's money when it was paid, and he is the proper person from whom to demand it.

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[62] See Buller v. Harrison (1777), 2 Cowp. 565, Goddard's Cas. 680; Langley v. Warner (1850), 3 N. Y. 327; LaFarge v. Kneeland (1827), 7 Cow. (N. Y.) 456; Cabot v. Shaw, *supra*.

[63] See Smith v. Binder, *supra;* Buller v. Harrison, *supra;* Garland v. Salem Bank (1812), 9 Mass. 408, 6 Am. Dec. 86.

[64] See Smith v. Kelly (1880), 43 Mich. 390, 5 N. W. 437.

[65] See Ripley v. Gelston (1812), 9 Johns. (N. Y.) 201, 6 Am. Dec. 271; Grover v. Morris (1878), 73 N. Y. 473; Lilienthal v. Carpenter (1912), 148 Ky. 50, 146 S. W. 2; Moore v. Shields (1889), 121 Ind. 267, 23 N. E. 89, Goddard's Cas. 686; Larkin v. Hapgood (1884), 56 Vt. 597; Hardy v. American Exp. Co. (1902), 182 Mass. 328, 65 N. E. 375, 59 L. R. A. 731.

[66] See Grover v. Morris, *supra*.

§ 387. Where agent is mere stakeholder.—Where the person to whom the money was paid was not really the agent of either party, but a mere stakeholder, authorized to hold the money until an agreed event is determined, and then is to pay it over to the person entitled, and he pays it over in violation of the agreement, or before the event is determined, the party who is entitled may recover it from him.[68]

5. *Where Agent has received Money for third Person.*

§ 388. Money delivered to agent by principal for third person.—Where money has been delivered to an agent by the principal with instructions to pay it to a third person, this creates ordinarily only a revocable agency, and the principal may countermand the order to pay, and recover the money from the agent, at any time before the situation has been changed,[69] as where the agent has either paid it over to the third person, or assumed an obligation to such third person to pay it to him.

So long as it remains a mere revocable agency, the third person may not ordinarily recover the money from the agent, though the cases are in great conflict.[70] If the agent has assumed a legal obligation to pay it to the third person, the latter may recover it accordingly.[71]

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[67] See Ellis v. Goulton [1893], 1 Q. B. 350; Kurzawski v. Schneider (1897), 179 Pa. 500, 36 Atl. 319; Bogart v. Crosby (1889), 80 Cal. 195, 22 Pac. 84; Bleau v. Wright (1896), 110 Mich. 183, 68 N. W. 115; Huffman v. Newman (1898), 55 Neb. 713, 76 N. W. 409; Wilson v. Wold (1899), 21 Wash. 398, 58 Pac. 223, 75 Am. St. R. 846.

Compare Smith v. Binder (1874), 75 Ill. 492.

Agent liable where he acted for an undisclosed principal: Pancoast v. Dinsmore (1909), 105 Me. 471, 75 Atl. 43, 134 Am. St. R. 582.

[68] See Read v. Riddle (1886), 48 N. J. L. 359, 7 Atl. 487.

[69] See Beers v. Spooner (1838), 9 Leigh (Va.) 153; Clark v. Cilley (1860), 36 Ala. 652, 76 Am. Dec. 343; Brockmeyer v. Washington Bank (1888), 40 Kan. 744, 21 Pac. 300; Tiernan v. Jackson (1831), 30 U. S. (5 Pet.) 580, 8 L. Ed. 234; McDonald v. American Nat. Bank (1901), 25 Mont. 456, 65 Pac. 896.

§ 389. —— But there may be more than a mere revocable agency between the principal and the agent: there may be a *contract* between them that the agent shall pay the money to the third person. Whether the third person may sue for and recover it in such a case from the agent is not certain. It is held in a good many cases that a person for whose benefit a contract was made but who was not a party to it, cannot maintain an action at law upon it. Many other cases—doubtless a majority—recognize the right of the beneficiary under a contract, though not a party to it, to sue upon and enforce it.[72]

This, however, is a question for a treatise on the law of contract.

§ 390. —— So, again, instead of being a mere revocable *agency*, or a *contract* to pay to the third person, the money may be put into the hands of the so-called agent *in trust* for the benefit of the third person. If the so-called agent, *i. e.*, the trustee, accepts the trust, the beneficiary may have such remedies, equitable or legal, as he may have in such cases under the law of trusts;[73] but that also is foreign to the present subject.

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[70] See Williams v. Everett (1811), 14 East 582, Goddard's Cas. 689; Seeman v. Whitney (1840), 24 Wend. (N. Y.) 260, 35 Am. Dec. 618; Burton v. Larkin (1887), 36 Kan. 246, 13 Pac. 398, 59 Am. Rep. 541; Nolan v. Manton (1884), 46 N. J. L. 231, 50 Am. Rep. 403.

Compare Hall v. Marston (1822), 17 Mass. 575; Keene v. Sage (1883), 75 Me. 138.

[71] See Goodwin v. Bowden (1867), 54 Me. 424; Wyman v. Smith (1849), 2 Sandf. (N. Y.) 332; Crowfoot v. Gurney (1832), 9 Bing. 372; Walker v. Rostron (1842), 9 Mees. & Wels. 411; Griffin v. Weatherby (1868), L. R. 3 Q. B. 753.

[72] See 1 Williston on Contracts, §§ 347-403.

See also the exhaustive note upon this subject in 71 Am. St. Rep. 176. Also 25 L. R. A. 257; 39 Am. St. Rep. 531; 9 Am. Dec. 155; 3 Am. Dec. 305.

[73] See McKee v. Lamon (1895), 159 U. S. 317, 16 Sup. Ct. 11, 40 L. Ed. 165; Rogers Locomotive Works v. Kelley (1882), 88 N. Y. 234.

II. LIABILITY OF AGENT IN TORT.

§ 391. Agency usually no defense in tort cases.—It is frequently said that, in actions brought by third persons to recover for torts committed against them, the relation of principal and agent does not exist. The ideas which underlie this statement are chiefly these:—1. The law has certain standards of conduct which every one who acts must comply with, for the protection of other persons. Neither one's own business nor one's principal's business may lawfully be carried on in disregard of other persons' rights. 2. If one does as agent that which his principal has not attempted to authorize, and which constitutes a tort against a third person, the assumed agent must answer for it, because he is the real and the only wrongdoer. 3. If one does as agent that which a principal has purported to authorize, but which he could not lawfully authorize, and which constitutes a tort against a third person, the assumed agent cannot justify his act by his principal's authority, for by the hypothesis the principal had none, and the actor must answer to the third person for his wrongful act. The fact that the assumed principal might also be liable would be no defense to the agent if the third person preferred to recover of the latter.

§ 392. Agent liable for negligent acts outside of employment.—An agent or servant is clearly personally liable to third persons for his negligent acts *outside* of his employment, whereever he would be liable for the same act if he had not pretended to be agent. The principal or master would not be liable (since the act by the hypothesis is outside of the employment) and the agent or servant is the real wrongdoer. If an agent or servant, for example, acting entirely outside of his employment, should take his master's horse and cart and go off upon "a frolic of his own," and while so engaged should injure a third person by his negligent management of the horse and cart, he would be liable to the person so injured, but the master would not be liable.

§ 393. Agent liable for fraud, misrepresentation or deceit.—An agent is personally liable for actionable fraud, misrepresentation or deceit practiced by him in the performance of his agency. One case of this sort has already been considered—conscious misrepresentation of his authority[74]; but the liability is not confined to cases of that sort.[75] The principal also may be held where the fraud is practiced in the course of the employment.

§ 394. Agent liable for his wilful or malicious acts.—An agent may be held personally liable for actionable wanton or malicious acts done by him while acting as agent.[76] Although it was at one time thought that the principal could not be liable for such wilful acts,[77] it is now generally agreed that he may be, if they were done in the course of the employment.[78]

§ 395. Agent liable for trespass.—An agent who commits an act against the person or property of another, which will constitute an actionable trespass if it be not justified, can not justify it merely by showing that he did it by the express or implied direction or authority of a principal, unless the principal himself could justify it. If he can not, the agent must answer to the third person,[79] even though the master might also be held. The agent's good faith will not save him, but it will ordinarily be a prerequisite to his right to recover indemnity from the principal whose directions led him into the difficulty. If the agent in committing the trespass violated the instructions of his principal, he would still be liable to the third person, but he could ordinarily recover no indemnity from his principal.

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[74] See *ante*, § 351.

[75] See Weber v. Weber (1882), 47 Mich. 569, 11 N. W. 389, Wambaugh's Cas. 488; Wilder v. Beede (1898), 119 Cal. 646, 51 Pac. 1083; Reed v. Peterson (1887), 91 Ill. 288; Endsley v. Johns (1887), 120 Ill. 469, 12 N. E. 247, 60 Am. Rep. 572; Hedin v. Minn. Med. Inst. (1885), 62 Minn. 146, 64 N. W. 158, 54 Am. St. R. 628, 35 L. R. A. 417.

[76] See Garrett v. Sparks (1911), 61 Wash. 397, 112 Pac. 501, Goddard's Cas. 692; Carraher v. Allen (1900), 112 Iowa 168, 83 N. W. 902; Hewett v. Swift (1862), 85 Mass. (3 Allen) 420; Able v. Southern Ry. (1905), 73 S. Car. 173, 52 S. E. 962; Schumpert v. Southern Ry. (1902), 65 S. Car. 332, 43 S. E. 813, 95 Am. St. R. 802.

[77] See *post* § 537.

[78] See *post* § 538.

[79] See Mill v. Hawker (1875), L. R. 10 Exch. 92; Smith v. Colby (1878), 67 Me. 169; Blue v. Briggs (1894), 12 Ind. App. 105, 39 N. E. 885; Semonian v. Panoras (1922), — R. I. —, 116 Atl. 417, 20 A. L. R. 83.

§ 396. Liability of agent for conversion.—An agent who, without legal justification, takes, detains or sells the goods of another, is liable to the owner for the conversion, even though he acted in good faith, supposing the property to be that of his principal, or although he did so by the direction of his principal, supposing that the principal was authorized to give the directions. The fact that he has delivered to his principal the property taken, or has paid over to his principal the proceeds of property wrongfully sold by his direction, is immaterial, so far as his liability to the third person is concerned.[80]

Where, however, the agent has in good faith received from his principal property which he supposes to belong to the principal, it would not, it is held, of itself, constitute a conversion that he qualifiedly refused to surrender it, on demand by a third person, until he had had an opportunity to investigate, or confer with his principal, even though the third person should show that he was entitled to it.[81]

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[80] See Spraights v. Hawley (1867), 39 N. Y. 441, 100 Am. Dec. 452; Miller v. Wilson (1896), 98 Ga. 567, 25 S. E. 578, 58 Am. St. Rep. 319; Kimball v. Billings (1867), 55 Me. 147, 92 Am. Dec. 581; Wing v. Milliken (1898), 91 Me. 387, 40 Atl. 138, 64 Am. St. R. 238; Swim v. Wilson (1891), 90 Cal. 126, 27 Pac. 33, 25 Am. St. R. 110, 13 L. R. A. 605; Robinson v. Bird (1893), 158 Mass. 357, 33 N. E. 391, 35 Am. St. Rep. 495.

He need not be the *sole* converter; he is liable where he assists the principal. Ping v. Kershaw (1923), — Okla. —, 213 Pac. 840; Note, 20 A. L. R. 120.

But see Frizzell v. Rundle (1889), 88 Tenn. 396, 12 S. W. 918, 17 Am. St. R. 908; Roach v. Turk (1872), 56 Tenn. (9 Heisk.) 708, 24 Am. Rep. 360.

Held, not to be a converter where he acted in good faith in reliance upon an authority revoked in fact but of which he was ignorant: Jones v. Hodgkins (1872), 61 Me. 480. See also White v. Bank (1916), 144 C. C. A. 257, 229 Fed. 975.

§ 397. **Agent liable for his negligent acts in performing his agency.**—An agent or servant is also usually personally liable for injuries caused to third persons by his negligent acts done while executing his agency, wherever he would be if he were not agent. The agency or service may usually be performed without injury to third persons if performed with due care by the agent or servant. The principal or master expects and often expressly directs that such due care shall be exercised. Nevertheless the agent or servant fails to do so, and the injury results. Here the agent or servant is the real wrongdoer, and he is liable to the person injured.[82] Under our law, this tort is also imputed to the principal or master, because done in the course of his business, and he may be held liable though personally free from fault.[83] In actual practice he is usually the one sued, but the agent or servant who was the actual wrongdoer is liable, and may be held by the person injured if he prefers to do so.

Thus if a servant is driving his master's horse and cart, although by the authority of the master and about the master's business, he owes a duty to third persons, as well as to his master, to exercise due care in such driving, and if he negligently fails to do so and thereby injures a pedestrian or another driver, he is liable to the person injured, although his master may likewise be held.

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[81] See Singer Mfg. Co. v. King (1884), 14 R. I. 511; see also Goodwin v. Wertheimer (1885), 99 N. Y. 149, 1 N. E. 404.

[82] See Humphreys Co. v. Frank (1909), 46 Colo. 524, 105 Pac. 1093; Southern Ry. Co. v. Grizzle (1905), 124 Ga. 735, 53 S. E. 244, 110 Am. St. R. 191; Southern Ry. Co. v. Reynolds (1906), 126 Ga. 657, 55 S. E. 1039; Hewett v. Swift (1862), 85 Mass. (3 Allen) 420; Breen v. Field (1892), 157 Mass. 277, 31 N. E. 1075; Corliss v. Keown (1910), 207 Mass. 149, 93 N. E. 143; Johnson v. Barber (1849), 10 Ill. 425, 50 Am. Dec. 416, Wambaugh's Cas. 475; Bennett v. Bayes (1860), 5 H. & N 391, Wambaugh's Cas. 479; Horner v. Lawrence (1874), 37 N. J. L. 46, Wambaugh's Cas. 483.

[83] See *post* § 499.

The fact that the person injured is a fellow-servant of the one doing the injury, does not affect his liability,[84] though the master might not be liable under the fellow-servant rule.

§ 398. Agent not liable to third persons in tort for breach of duty owing to principal alone.—An agent is not liable in tort to third persons who have suffered a loss because of the agent's failure to perform some duty which he owed to his principal alone. This is quite clear in the case of purely contractual duties, even though the third person would have profited from the performance of the contract.[85] But there are other cases. Thus, one who purchases real estate in reliance upon an opinion as to its title given to the vendor by the latter's attorney, or who purchases a mortgage upon the strength of a search made by the attorney of the original mortgagee cannot, it has been held, recover of the attorney if the title proves defective or the search incomplete.[86]

Where, however, when the agent undertook the service, he contemplated that certain other persons or class of persons would rely upon his careful performance, and would be injured by his negligence, the situation as to such persons may be different.[87]

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[84] See Osborne v. Morgan (1881), 130 Mass. 102, 39 Am. Rep. 437, Mechem's Cas. 518, Wambaugh's Cas. 484.

[85] See Denny v. Manhattan Co. (1846), 2 Denio (N. Y.) 115, (aff'd. 5 Denio 639), Goddard's Cas. 694, Wambaugh's Cas. 473.

[86] See Savings Bank v. Ward (1879), 100 U. S. 195, 25 L. Ed. 621; Dundee Mortg. Co. v. Hughes (1884), 20 Fed. 39; Houseman v. Girard Assn. (1876), 81 Pa. St. 256; Fish v. Kelly (1864), 17 Com. B. (N. S.) 194; Buckley v. Gray (1895), 110 Cal. 339, 42 Pac. 900, 52 Am. St. R. 88, 31 L. R. A. 862; Mallory v. Ferguson (1893), 50 Kan. 685, 32 Pac. 410, 22 L. R. A. 99; Talpey v. Wright (1895), 61 Ark. 275, 32 S. W. 1072, 54 Am. St. R. 206.

Compare Lawall v. Groman (1897), 180 Pa. 532, 37 Atl. 98, 57 Am. St. R. 662; Glanzer v. Shepard (1922), 233 N. Y. 236, 135 N. E. 275, 23 A. L. R. 1425; MacPherson v. Buick Motor Co. (1916), 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F, 696.

[87] See Anderson v. Spriestersbach (1912), 69 Wash. 393, 125 Pac. 166, 42 L. R. A. (N. S.) 176; Brown v. Sims (1898), 22 Ind. App. 317, 53 N. E. 779, 72 Am. St. R. 308; Western Loan Co. v.

§ 399. Agent not liable to third person for not undertaking service in which third person interested.—So where an agent or servant has agreed with his principal or master that he will undertake for him some service in which third persons are interested, but he never does undertake it, he is not liable for such failure to the third persons, although they may be injured by not getting the contemplated service. The agent is not liable to them contractually, for he has made no contract with them; and he is not liable to them in tort, for as yet he owes no duty to them, but only to his principal.

If, however, he should enter upon performance and take control of the situation, he might thence forward come under duties to third persons.[88] If one should agree to drive his principal's omnibus, but later refuse to go near it, he would violate his contractual duty to his employer, but not violate any duty he owed to expectant passengers. But if he started to drive and received the third persons as passengers, he would then owe some duty to them.

§ 400. Agent not liable to third persons where neither he nor his principal owed them a duty.—An agent may owe a duty to his principal, where neither he nor his principal owes any duty to third persons, though they may be interested in his performance of that duty. Thus a property owner who wishes to keep his own property neat and tidy, in order not to offend his neighbors, or to detract from the value of their property, may employ an agent or servant to keep his property in good order. If the agent or servant neglects his duty to his principal under this employment, and his principal thereby

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Abstract Co. (1904) 31 Mont. 448, 78 Pac. 774, 107 Am. St. R. 435; Dickle v. Abstract Co. (1890), 89 Tenn. 431, 14 S. W. 896, 24 Am. St. R. 616; Equitable B. & L. Ass'n v. Bank of Commerce (1907), 118 Tenn. 678, 102 S. W. 901, 12 Ann. Cas. 407, 12 L. R. A. (N. S.) 449.

[88] See Osborne v. Morgan (1881), 130 Mass. 102, 39 Am. Rep. 437, Mechem's Cas. 518, Wambaugh's Cas. 484; Southern Ry. Co. v. Grizzle (1905), 124 Ga. 735, 53 S. E. 244, 110 Am. St. R. 191.

suffers injury, the agent or servant may be liable to the principal, but he would not be liable to the neighbors (no nuisance being created) even though they could show that their property was rendered less valuable or desirable because of the neglect of the principal's property by the agent or servant. Neither the principal nor the agent owed the neighbors any legal duty with regard to the mere esthetic condition of the property.

But though the agent might not be liable where his non-performance simply resulted in a condition which offended the eye of his neighbor, he would be liable if, having the power and the means, he negligently managed the property, so that *e. g.*, a barn door fell upon the neighbor and injured him.

§ 401. Agent's liability for non-feasance or misfeasance.— It is often said that an agent is not liable to third person for "non-feasance," but is liable to them for "misfeasance." What has been said above will throw some light upon this question.

It is true that the agent is not liable to third persons for the breach of a duty owing solely to his principal, but there are many cases wherein he may incur a liability to third persons. Thus an agent charged with the custody and control of property, while he may owe duties respecting it to his principal, may at the same time be under an obligation not to permit the property so controlled by him to cause injury to third persons. An agent given possession and control of a horse may be under a duty to his principal not to injure the horse by overdriving, but he is also under a duty to third persons not to negligently injure them while overdriving the horse. So an agent given the charge and control of real estate and charged with the duty and furnished with the means of keeping it in repair, owes a duty to his principal that the latter shall not suffer from his neglect in making repairs, but he may also owe a duty to third persons to see that they do not sustain a direct physical injury by reason of his negligent failure to keep the property in suitable repair.[89] Where the agent thus owes a duty to third persons, he will be liable to them for injuries caused by his failure to perform the duty owing to them,[90] even though he may also be liable to his principal for the neglect of the duty which he owed to him. The breach of a duty owing to the principal alone where it consists in not doing something which he ought to do, may be termed *non-feasance;* the breach of the duty owing to third persons not to injure them by the same act or omission which causes injury to his principal, may be termed *mis-feasance;* though names count but little in such a case.

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[89] See Baird v. Shipman (1890), 132 Ill. 16, 23 N. E. 384, 22 Am. St. R. 504, 7 L. R. A. 128, Goddard's Cas. 697, Wambaugh's Cas. 491.

The fact that the agent may thus owe a duty to third persons as well as to his principal seems sometimes to be overlooked.

§ 402. How sued—Joinder.—The agent may be sued alone or, in most cases under modern procedure, jointly with his principal.[91]

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[90] See Baird v. Shipman, *supra;* Williams v. Dean (1907), 134 Iowa 216, 111 N. W. 931, 11 L. R. A. (N. S.) 410; Emery v. American Refrig. Trans. Co. (1922), 193 Iowa 93, 184 N. W. 750, 20 A. L. R. 86; Ellis v. McNaughton (1889), 76 Mich. 237, 42 N. W. 1113, 15 Am. St. R. 308; Bannigan v. Woodbury (1909), 158 Mich. 206, 122 N. W. 531, 133 Am. St. R. 371; Orcutt v. Century Bldg. Co. (1907), 201 Mo. 424, 99 S. W. 1062, 8 L. R. A. (N. S.) 929; Lough v. Davis (1902), 30 Wash. 204, 70 Pac. 491, 94 Am. St. R. 848, 59 L. R. A. 802; Hagerty v. Montana Ore Co. (1908), 38 Mont. 69, 98 Pac. 643, 25 L. R. A. (N. S.) 356; Consolidated Gas Co. v. Connor (1910), 114 Md. 140, 78 Atl. 725, 32 L. R. A. (N. S.) 809; Greenberg v. Lumber Co. (1895), 90 Wis. 225, 63 N. W. 93, 48 Am. St. R. 911, 28 L. R. A. 439, Goddard's Cas. 695; Bell v. Josselyn (1855), 69 Mass. (3 Gray) 309, 63 Am. Dec. 741, Wambaugh's Cas. 478; Horner v. Lawrence (1874), 37 N. J. L. 46, Wambaugh's Cas. 483; Tippecanoe Loan & Tr. Co. v. Jester (1913), 180 Ind. 357, 101 N. E. 915, L. R. A. 1915E, 721.

But compare Feltus v. Swan (1884), 62 Miss. 415, Goddard's Cas. 695, Wambaugh's Cas. 489; Mullican v. Light & Ry. Co. (1920), 121 Miss. 806, 83 So. 816, 9 A. L. R. 165; Delaney v. Rochereau (1882), 34 La. Ann. 1123, 44 Am. Rep. 456, Mechem's Cas. 514; Galbraith v. Ill. Steel Co. (1904), 66 C. C. A. 359, 133 Fed. 485, 2 L. R. A. (N. S.) 799; Dean v. Brock (1894), 11 Ind. App. 507, 38 N. E. 829; Drake v. Hagan (1902), 108 Tenn. 265, 67 S. W. 470.

[91] See Southern Ry. Co. v. Grizzle (1905), 124 Ga. 735, 53 S. E. 244, 110 Am. St. R. 191; Shearer

Certain of the older authorities, however, deny that there is, in these cases, any *joint* liability, unless the principal in fact directed or participated in the act.[92]

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v. Evans (1883), 89 Ind. 400; Dowell v. Chicago, etc., Ry. Co. (1910), 83 Kan. 562, 112 Pac. 136; Ill. Cent. Ry. Co. v. Coley (1905), 121 Ky. 385, 89 S. W. 234, 28 Ky. L. Rep. 336, 1 L. R. A. (N. S.) 370; Ill. Cent. Ry. Co. v. Houchins (1905), 121 Ky. 526, 89 S. W. 530, 28 Ky. L. Rep. 499, 123 Am. St. R. 205, 1 L. R. A. (N. S.) 375; Mayberry v. North Pac. Ry. Co. (1907), 100 Minn. 79, 110 N. W. 356, 10 Ann. Cas. 754, 12 L. R. A. (N. S.) 675; McGinnis v. Chicago, etc., Ry. Co. (1906), 200 Mo. 347, 98 S. W. 590, 118 Am. St. R. 661, 9 Ann. Cas. 656, 9 L. R. A. (N. S.) 880; Shaefer v. Osterbrink (1886), 67 Wis. 495, 30 N. W. 922, 58 Am. Rep. 875; Alabama, etc., Ry. Co. v. Thompson (1905), 200 U. S. 206, 26 S. Ct. 161, 50 L. Ed. 441.

[92] See Campbell v. Portland Sugar Co. (1873), 62 Me. 552, 16 Am. Rep. 503; Parsons v. Winchel (1850), 59 Mass. (5 Cush.) 592, 52 Am. Dec. 745; Clark v. Fry (1858), 8 Ohio St. 358, 72 Am. Dec. 590; McNemar v. Cohn (1904), 115 Ill. App. 31.

CHAPTER XIV.

OF THE DUTIES AND LIABILITIES OF THE PRINCIPAL TO THE AGENT.

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§ 403. **In general.**—The chief duties of the principal to the agent are (1) to pay him his compensation; (2) to reimburse him for expenses, and indemnify him against losses and liabilities, properly incurred in the execution of the agency; and (3) to compensate him for physical injuries received in the principal's service as the result of the principal's negligence.

1. *The Payment of Compensation.*

§ 404. **The right to have compensation.**—The agent's *right* to compensation may be determined by the contract of the parties, or be implied by law. Where the parties have expressly agreed that the agent shall or shall not be entitled to compensation, or upon what conditions only he shall be entitled to compensation, their agreement is usually conclusive.[1]

Where an express agreement is shown upon the subject, there is ordinarily no room for an implied one.

§ 405. —— An express agreement to pay is not usually necessary. As a rule, wherever services have been rendered by one person at the express request of another, and especially when rendered in the line of the business or profession of the one rendering them, it will be presumed, until the contrary is shown, that they were to be paid for.[2] If the person who requested them contends that they were to be gratuitous, he will have the burden of proving it.

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[1] See Resso v. Lehan (1895), 96 Iowa 45, 64 N. W. 689 (compare Magarrell v. Magarrell (1888), 74 Iowa 378, 37 N. W. 961); Faloon v. McIntyre (1886), 118 Ill. 292, 8 N. E. 315; Collar v. Patterson (1891), 137 Ill. 403, 27 N. E. 604; Allen v. Allen (1886), 60 Mich. 635, 27 N. W. 702; Disbrow v. Durand (1892), 54 N. J. L. 343, 24 Atl. 545, 33 Am. St. R. 678; Hall v. Finch (1871), 29 Wis. 278, 9 Am. Rep. 559; Lockwood v. Robbins (1890), 125 Ind. 398, 25 N. E. 455, Goddard's Cas. 607.

A request may at times be implied, as where one knowingly receives without protest services of a sort usually paid for, which, as he had reason to believe, were being rendered upon the basis that they had in fact been requested by the recipient and were to be paid for by him.[3]

But no promise to pay will be implied, even for requested services, where the parties are near relatives or others who are members of the same family and are therefore presumptively acting from other motives than pecuniary ones.[4] In such a case, the promise to pay must be express.

So no promise to pay will be implied where the circumstances rebut such an inference, as where the services were rendered as a mere act of kindness,[5] or upon the hope or expectation, merely, that they would be paid for.[6] *A fortiori* not for services officiously and obtrusively thrust upon another without shadow of request.[7]

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[2] See Gilbert v. Judson (1890), 85 Cal. 105, 24 Pac. 643; Morehouse v. Remson (1890), 59 Conn. 392, 22 Atl. 427; Zerrahn v. Ditson (1895), 117 Mass. 553; Beatty v. Russell (1894), 41 Neb. 321, 59 N. W. 919; Ames v. Lamont (1900), 107 Wis. 531, 83 N. W. 780.

[3] See Bradford v. Kimberly (1818), 3 Johns. Ch. (N. Y.) 431, Mechem's Cas. 523; Succession of Kreheler (1892), 44 La. Ann. 726, 11 So. 35, Goddard's Cas. 605; Dougherty v. Whitehead (1860), 31 Mo. 255; Linn v. Linderoth (1891), 40 Ill. App. 320; Prince v. McRae (1881), 84 N. Car. 674; Harrel v. Zimpleman (1886), 66 Tex. 292, 17 S. W. 478.

[4] See Wood v. Brewer (1880), 66 Ala. 570; McCrary v. Ruddick (1871), 33 Iowa 521; Shelton v. Johnson (1874), 40 Iowa 84; Muscott v. Stubbs (1880), 24 Kan. 520; Coe v. Wager (1879), 42 Mich. 49, 3 N. W. 248; Kinder v. Pope (1905), 106 Mo. App. 536, 80 S. W. 315; Garrey v. Stadler (1886), 67 Wis. 512, 30 N. W. 787, 58 Am. Rep. 877; Harrison v. Gotlieb (1888), 2 O. C. D. 109, 3 Ohio Cir. Ct. 191, Goddard's Cas. 612.

[5] See Chadwick v. Knox (1855), 31 N. H. 226, 64 Am. Dec. 329.

[6] See Scott v. Maier (1885), 56 Mich. 554, 23 N. W. 218, 56 Am. Rep. 402; St. Jude's Church v. Van Denberg (1875), 31 Mich. 287; Allen v. Bryson (1885), 67 Iowa 591, 25 N. W. 820, 56 Am. Rep. 358.

§ 406. —— Though an act when done was unauthorized its subsequent ratification may give the agent the same right to compensation as though it had been previously authorized.[8]

§ 407. The amount of compensation.—If it be found that the agent is entitled to compensation, the next question will be as to the *amount*. Where the parties have agreed upon the amount of compensation to be paid, the agreement will usually be conclusive, both as to the maximum and the minimum recovery.[9] In such a case, evidence of the customary rate or the reasonable value is irrelevant.

Where no amount is agreed upon, the law will imply a promise to pay the market or customary rate if the parties are dealing with reference to such a rate;[10] if not, to pay the usual sum, if there be a usage, and if not then to pay what the services are reasonably worth.[11]

For the purpose of determining what they are reasonably worth, the opinions of witnesses who are familiar with the subject may be received.[12]

The agent *may* agree that the amount of his compensation shall be fixed by the principal, as where he agrees to work for what the latter "thinks he is worth,"[13] but such an unusual agreement must be clearly shown.[14]

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[7] See Welch v. Collenbaugh (1911), 150 Iowa 692, 130 N. W. 792; Samuels v. Luckenbach (1903), 205 Pa. 428, 54 Atl. 1091.

[8] See Wilson v. Dame (1878), 58 N. H. 392, Mechem's Cas. 526.

[9] See Wallace v. Floyd (1857), 29 Pa. St. 184, 72 Am. Dec. 620, Mechem's Cas. 525, Goddard's Cas. 608; Hamilton v. Frothingham (1886), 59 Mich. 253, 26 N. W. 486; Jefferson v. Burhans (1898), 29 C. C. A. 481, 85 Fed. 949; Prouty v. Perry (1909), 142 Iowa 294, 120 N. W. 722; Ames v. Lamont (1900), 107 Wis. 531, 83 N. W. 780.

[10] See Hollis v. Weston (1892), 156 Mass. 357, 31 N. E. 483; Potts v. Aechternacht (1880), 93 Pa. 138; Vilas v. Downer (1849), 21 Vt. 419, Goddard's Cas. 610.

[11] See Tucker v. Preston (1887), 60 Vt. 473, 11 Atl. 726; Slater v. Cook (1896), 93 Wis. 104, 67 N. W. 15; Stockbridge v. Crooker (1852), 34 Me. 349, 56 Am. Dec. 662.

[12] See Eggleston v. Boardman (1877), 37 Mich. 14; Bowen v. Bowen (1881), 74 Ind. 470; Johnson v. Thompson (1880), 72 Ind. 167, 37 Am. Rep. 152.

§ 408. **When compensation deemed to be earned.**—The parties may agree upon the time when the compensation shall be due, and if they so fix the time, their agreement will ordinarily be conclusive. In the absence of such an agreement, however, the agent's compensation will usually be considered to be earned, when and only when he has fully completed his undertaking according to its terms.[15]

If, however, the agent has done all that he undertook to do, he is entitled to his compensation even though the principal received no benefit, or failed or refused to avail himself of the advantages secured. Thus a broker employed to effect a sale of property is entitled to his commission when he has found a purchaser ready, willing and able to buy on the proposed terms, even though the principal does not, will not, or cannot, through defective title or otherwise, complete the sale.[16]

It is, however, entirely competent for the parties to agree that the agent shall be paid only in case he accomplishes a certain result; and if, in such a case, without the fault of the principal, he fails to accomplish that result, he will not be entitled to any compensation, however much time and effort he may have expended in the matter.[17]

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[13] See Butler v. Winona Mill Co. (1881), 28 Minn. 205, 9 N. W. 697, 41 Am. Rep. 277.

[14] See Millar v. Cuddy (1880), 43 Mich. 273, 5 N. W. 316, 38 Am. Rep. 181, Goddard's Cas. 609.

[15] See Flower v. Davidson (1890), 44 Minn. 46, 46 N. W. 308; Aultman v. Ritter (1892), 81 Wis. 395, 51 N. W. 569; Hilliker v. Thresher Co. (1910), 145 Iowa 721, 122 N. W. 906; Cremer v. Miller (1893), 56 Minn. 52, 57 N. W. 318; Condict v. Cowdrey (1893), 139 N. Y. 273, 34 N. E. 781; Jones v. Eilenfeldt (1902), 28 Wash. 687, 69 Pac. 368.

[16] See *post* § 646; Gelatt v. Ridge (1893), 117 Mo. 553, 23 S. W. 882, 38 Am. St. R. 683; Barthell v. Peter (1894), 88 Wis. 316, 60 N. W. 429, 43 Am. St. R. 906; Wray v. Carpenter (1891), 16 Colo 271, 27 Pac. 248, 25 Am. St. R. 265; Wilson v. Mason (1895), 158 Ill. 304, 42 N. E. 134, 49 Am. St. 162; Dillon v. Coal Co. (1921), 89 W. Va. 395, 109 S. E. 334; Kelly v. Phelps (1883), 57 Wis. 425, 15 N. W. 385.

§ 409. Where employment terminated by principal.—Where the employment was merely at will, and not for a definite time, the principal may terminate it at any time; in which case the agent will only be entitled to compensation for such services as he has already performed, and which the principal has accepted. The principal may not, however, even though compensation is deemed contingent upon performance, terminate the employment merely to escape payment of compensation, where the undertaking has been substantially performed, and the agent is upon the very point of completing it.[18]

Where the employment was for a definite time, different considerations arise. Even here the employer may terminate it rightfully, although the prescribed time has not expired, if he has reserved the right to do so by the contract. He may also do so rightfully where the employee is guilty of conduct which will justify his discharge, such as wilful disobedience or misconduct, disloyalty, and the like.

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[17] See Hale v. Kumler (1898), 29 C. C. A. 67, 85 Fed. 161; Idler v. Borgmeyer (1895), 13 C. C. A. 198, 65 Fed. 910; Mattingly v. Pennie (1895), 105 Cal. 514, 39 Pac. 200, 45 Am. St. R. 87; Butler v. Baker (1892), 17 R. I. 582, 23 Atl. 1019, 33 Am. St. R. 897; La Force v. University (1904), 106 Mo. App. 517, 81 S. W. 209, Goddard's Cas. 634.

[18] See Sibbald v. The Iron Co. (1880), 83 N. Y. 378, 38 Am. Rep. 441, Mechem's Cas. 301; Warren Chemical Co. v. Holbrook (1890), 118 N. Y. 586, 23 N. E. 908, 16 Am. St. R. 788; Glover v. Henderson (1893), 120 Mo. 367, 25 S. W. 175, 41 Am. St. R. 695; Green v. Cole (1895), 127 Mo. 587, 30 S. W. 135; Jaekel v. Caldwell (1893), 156 Pa. 266, 26 Atl. 1063; Zwolanek v. Baker Mfg. Co. (1912), 150 Wis. 517, 137 N. W. 769, 44 L. R. A. (N. S.) 1214, Ann. Cas. (1914A) 793; Gillett v. Corum (1871), 7 Kan. 156, Goddard's Cas. 629.

If the agent failed to make the sale, the fact that the principal later succeeded in making it, even to the same person, will not, of itself, entitle the agent to the agreed commission: Kelly v. Marshall (1896), 172 Pa. 396, 33 Atl. 690; Attrill v. Patterson (1881), 58 Md. 226, Goddard's Cas. 632.

Commissions already earned, are not lost by the termination of the employment, unless there is an agreement to that effect: Dibble v. Dimick (1894), 143 N. Y. 549, 38 N. E. 724.

Even though the employer may have no legal justification for terminating the employment, he usually has the *power* to do so, because, though he may thereby break the contract, such contracts are not usually specifically enforced, and the employee must resort to an action at law for damages. What his remedy is, in such a case, is considered in the following section.

§ 410. —— Where employment wrongfully terminated.—

Where the agent has been employed for a definite time, and his employment is wrongfully terminated before that time has expired, he has usually his choice of three remedies (though the second and third differ only as to the time when the action is brought) :—

1. He may treat the contract as *rescinded,* and bring an action at once to recover, without reference to the contract, the reasonable value of the services already rendered, less any amount already paid him.[19]

2. He may treat the contract as in force but *broken,* and bring an action at once to recover damages for the *probable* loss which he has sustained by its violation—*i. e.*, the damages based upon the reasonable expectation of his finding other employment.[20]

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[19] The justification for this right to treat the contract as *rescinded,* is commonly said to be found in the conduct of the employer; he has shown that he regards the contract as not existing, and the employee, it is said, "may take him at his word," and may also treat the contract as ended.

[20] It is held in some cases that. if the action is tried before the expiration of the term, there can be no recovery for damages beyond the time of the trial, as they would be too speculative. See Gordon v. Brewster (1858), 7 Wis. 355; Van Winkle v. Satterfield (1894), 58 Ark. 617, 25 S. W. 1113, 23 L. R. A. 853; Mt. Hope Cemetery Ass'n v. Weidenmann (1891), 139 Ill. 67, 28 N. E. 834.

But the weight of authority permits reasonably probable future damages to be recovered. See Cutter v. Gillette (1895), 163 Mass. 95, 39 N. E. 1010; Webb v. Depew (1908), 152 Mich. 698, 116 N. W. 560, 16 L. R. A. (N S.) 813, 125 Am. St. Rep. 431; Heffelrich v. Sherman (1912), 28 S.

3. He may treat the contract as in force but broken and wait until the expiration of the term, (if the statute of limitations does not prevent), and then recover damages for the *actual* loss which he has sustained by its violation.[21]

He cannot pursue all of these remedies, and a recovery upon one will bar a recovery upon another.[22]

The second and third are in addition to his right to recover wages already earned, but not paid, at the time of the discharge.

§ 411. —— Agent's duty to mitigate his damage.—It is in

Dak. 627, 134 N. W. 815; Hamilton v. Love (1899), 152 Ind. 641, 53 N. E. 181, 54 N. E. 437, 71 Am. St. R. 384.

See also Pierce v. Tenn. Coal Co. (1898), 173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591.

[21] See Howard v. Daly (1875), 61 N. Y. 362, 19 Am. Rep. 285, Mechem's Cas. 526; Sutherland v. Wyer (1877), 67 Me. 64; Olmstead v. Bach (1893), 78 Md. 132, 27 Atl. 501, 44 Am. St. Rep. 273, 22 L. R. A. 74; Boland v. Glendale Quarry Co. (1895), 127 Mo. 520, 30 S. W. 151; Hamilton v. Love (1899), 152 Ind. 641, 53 N. E. 181, 54 N. E. 437, 71 Am. St. Rep. 384; James v. Allen Co. (1887), 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821; Baltimore Base Ball Club v. Pickett (1894), 78 Md. 375, 28 Atl. 279, 44 Am. St. R. 304, 22 L. R. A. 690; Doherty v. Schipper (1911), 250 Ill. 128, 95 N. E. 74, Ann. Cas. [1912B], 364, 34 L. R. A. (N. S.) 557; Harrington v. Empire Cream Separator Co. (1921), 120 Me. 388, 115 Atl. 89.

In Alabama and a few other States, there may be a recovery of wages on the theory of constructive service. Liddell v. Chidester (1887), 84 Ala. 508, 4 So. 426, 5 Am. St. Rep. 387, Mechem's Cas. 535. In Minnesota a peculiar ruling is made permitting much the same result as that reached in Alabama, though upon a different theory, namely, periodical indemnification for loss during that period: McMullan v. Dickinson Co. (1895), 60 Minn. 156, 62 N. W. 120, 51 Am. St. Rep. 511, 27 L. R. A. 409, Goddard's Cas. 624. But the weight of authority is opposed to these views, and permits a recovery of damages for breach of contract only. See cases cited above.

[22] Thus there are many cases in which a recovery of even a small sum *quantum meruit*, has been held to bar any later recovery for breach of contract. See James v. Parsons (1904), 70 Kan. 156, 78 Pac. 438, Keedy v. Long (1889), 71 Md. 385, 18 Atl. 704, 5 L. R. A. 759; Olmstead v. Bach, *supra*; Doherty v. Schipper, *supra*.

general the duty of an agent wrongfully discharged before the expiration of his term, to use reasonable diligence to obtain other employment of a like kind, and thus reduce his damage as far as possible; but he is generally held not obliged to take employment of an entirely different kind, or to move away to a different place to find it.[23] Some of the cases state this exception much more strongly than others.[24]

Re-employment by the original employer himself is not to be declined upon that ground alone, though there may be other circumstances, such as his objectionable character or his former treatment, which would justify declining it.[25]

The burden of proof is usually held to be upon the employer to show that the agent, with proper diligence, might have found other employment and failed to do so.[26]

§ 412. Where employment rightfully terminated.—Where, though employed for a definite term, the agent's employment has been rightfully terminated before the expiration of that term, as because of his misconduct or breach of duty, it is held, in many cases, that he cannot recover anything.[27] Where his misconduct was treacherous, fraudulent, disloyal, wilful or malicious, this holding is doubtless right,[28] but the true rule in other cases, such as negligent misconduct, seems to be that if, notwithstanding his misconduct, his services have been of some substantial value to the principal over and above the damage sustained by the principal from his misconduct, the agent may recover such excess.[29]

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[23] See Wilkinson v. Black (1885), 80 Ala. 329; Elbert v. Gas Co. (1893), 97 Cal. 244, 32 Pac. 9; Hinchcliffe v. Koontz (1889), 121 Ind. 422, 23 N. E. 271, 16 Am. St. R. 403; Farrell v. School District (1893), 98 Mich. 43, 56 N. W. 1053; Fuchs v. Koerner (1889), 107 N. Y. 529, 14 N. E. 445.

What he earns, or could have earned, in such other employment is, of course, to be deducted from his damages. Hunt v. Lehrack (1922), — Mo. App. —, 245 S. W. 52.

Voluntarily to surrender employment found has the same effect as not seeking for it: Sutherland v. Wyer (1877), 67 Me. 64.

[24] Some cases hold that if he is unable to find other employment of the same kind, he should then, rather than remain idle, accept some other employment for which he is fitted. See Simon v. Allen (1890), 76 Tex. 398, 13 S. W. 296; Perry v. Simpson Co. (1871), 37 Conn. 520; Meynard v. Corset Co. (1908), 200 Mass. 1, 85 N. E. 877.

[25] See Strauss v. Meertief (1879), 64 Ala. 299, 38 Am. Rep. 8; Birdsong v. Ellis (1884), 62 Miss. 418; Beymer v. McBride (1873), 37 Iowa 114.

[26] See Van Winkle v. Satterfield (1894), 58 Ark. 617, 25 S. W. 1113, 23 L. R. A. 853; Farrell v. School District, *supra;* Odeneal v. Henry (1892), 70 Miss. 172, 12 So. 154. *Contra:* Lewis Co. v. Scott (1894), 95 Ky. 484, 16 Ky. L. Rep. 49, 26 S. W. 192, 44 Am. St. R. 251.

§ 413. Where employment terminated by operation of law.—Where the employment is terminated by operation of law—as by reason of the death or insanity of one of the parties—no damages for the termination can ordinarily be recovered; but there may be recovery for services already rendered and accepted.[30]

Unforeseen illness usually has the same effect; but not such a disqualifying fact as bankruptcy.

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[27] This is sometimes put upon the ground that by his misconduct he forfeits his compensation; in other cases upon the ground that, where the contract was an entire one to pay for a certain period, his failure to perform for that period, because of his justifiable discharge, defeats his right to recover,—full performance being a condition precedent. See Beach v. Mullin (1870), 34 N. J. L. 343; Peterson v. Mayer (1891), 46 Minn. 468, 49 N. W. 245, 13 L. R. A. 72.

[28] See Wadsworth v. Adams (1890), 138 U. S. 380, 11 Sup. Ct. 303, 34 L. Ed. 984; Sea v. Carpenter (1847), 16 Ohio 412; Vennum v. Gregory (1866), 21 Iowa 326; Brannan v. Strauss (1874), 75 Ill. 234; Sumner v. Reicheniker (1872), 9 Kan. 320. But see Massey v. Taylor, 5 Coldw. (Tenn.) 477, 98 Am. Dec. 429.

[29] See Hildebrand v. American Fine Arts Co. (1901), 109 Wis. 171, 85 N. W. 268, 53 L. R. A. 826, Goddard's Cas. 620; Lawrence v. Gullifer (1854), 38 Me. 532; Kessee v. Mayfield (1859), 14 La. Ann. 90, (under the Code). Cotton v. Rand (1899), 93 Tex. 7, 51 S. W. 838, (a more liberal case).

[30] See Yerrington v. Greene (1863), 7 R. I. 589, 84 Am. Dec. 578; Clark v. Gilbert (1863), 26 N. Y. 279, 84 Am. Dec. 189.

See Griggs v. Swift (1889), 82 Ga. 392, 9 S. E. 1062, 14 Am. St. Rep. 176, 5 L. R. A. 405, Mechem's Cas. 537. But compare Hughes v. Gross (1896), 166 Mass. 61, 43 N. E. 1031, 55 Am. St. Rep. 375, 32 L. R. A. 620.

§ 414. Where agent abandons his undertaking.—Where the agent abandons his undertaking, and the employment was at will, merely, he may recover for the services already rendered. If, however, having agreed, under an entire rather than a severable contract, to serve for a definite time, the agent abandons his undertaking without cause, before the expiration of that time, it is held, in many cases, that he can recover nothing.[31] But a more liberal rule prevails in a number of States, which enables the agent, in such cases, to recover the reasonable value of the services rendered, not exceeding the contract price, after deducting damages for whatever loss the principal may have sustained by reason of the abandonment.[32]

Brief absences do not necessarily constitute an abandonment: it would depend upon the circumstances. Absence caused by an epidemic or a *vis major,* would not be a voluntary abandonment; neither would an absence caused by sickness, though if continued long enough it might justify the principal in terminating the contract. The agent is usually not entitled to wages during absence because of sickness, even though it is not deemed an abandonment.

§ 415. Where agent acted for both principals.—Where an agent, without the full knowledge and consent of both principals, has assumed to act as agent for both parties in the same transaction, the law, as has been seen, does not permit him to recover compensation from either party; but he may have compensation from both parties if his double employment was known and assented to by both principals.[33]

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[31] See Stark v. Parker (1824), 2 Pick. 267, 13 Am. Dec. 425, Mechem & Gilb. Cas. Damages, 526; Diefenback v. Stark (1883), 56 Wis. 462, 14 N. W. 621, 43 Am. Rep. 719; Timberlake v. Thayer (1893), 71 Miss. 279, 14 So. 446, 24 L. R. A. 231 and note, Goddard's Cas. 615; Steeples v. Newton (1879), 7 Oreg. 110, 33 Am. Rep. 705; cf. Todd v. Huntington (1884), 13 Oreg. 9, 4 Pac. 295; Angle v. Hanna (1859), 22 Ill. 429, 74 Am. Dec. 161; Miller v. Goddard (1852), 34 Me. 102, 56 Am. Dec. 638; Lantry v. Parks (1827), 8 Cow. (N. Y.) 63; Natalizzio v. Valentino (1904), 71 N. J. L. 500, 59 Atl. 8; Hutchinson v. Wetmore (1852), 2 Cal. 310, 56 Am. Dec. 337; Cody v. Raynaud (1871), 1 Colo. 272.

[32] See Britton v. Turner (1834), 6 N. H. 481, 26 Am. Dec. 713, Mechem & Gilb. Cas. Damages, 528; Allen v. McKibbin (1858), 5 Mich. 449; McClay v. Hedge (1864), 18 Iowa 66; Parcell v. McComber (1889), 11 Neb. 209, 7 N. W. 529, 38 Am. Rep. 366; Duncan v. Baker (1878), 21 Kan. 99; Carroll v. Welch (1864), 26 Tex. 147; Coe v. Smith (1853), 4 Ind. 79, 58 Am. Dec. 618; Downey v. Burke (1856), 23 Mo. 228.

§ 416. Where agent violated his trust.—An agent who is guilty of fraud or concealment, or who betrays his trust, or violates his duty of loyalty by allowing his own interests to interfere with those of his principal, cannot recover compensation for the services affected by such misconduct.[34]

§ 417. Where agency unlawful.—The agent cannot recover compensation for the doing of that which was unlawful to be done. Thus where a statute makes it unlawful to do business without a license, a broker doing business without a license cannot recover commissions.[35] And a broker who has been employed in furthering gambling transactions or unlawful dealings in "futures," cannot recover commissions.[36]

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[33] See *ante* § 298; Bell v. McConnell (1881), 37 Ohio St. 396, 41 Am. Rep. 528, Mechem's Cas. 538; Rice v. Wood (1873), 113 Mass. 133, 18 Am. Rep. 459, Mechem's Cas. 12; McDonald v. Maltz (1892), 94 Mich. 172, 53 N. W. 1058, 34 Am. St. R. 331; Rice v. Davis (1890), 136 Pa. 39, 20 Atl. 513, 20 Am. St. R. 931.

If the commissions have been paid in ignorance of the double agency, they may be recovered. Cannell v. Smith (1891), 142 Pa. 25, 21 Atl. 793, 12 L. R. A. 395; Jansen v. Williams (1893), 36 Neb. 869, 55 N. W. 279, 20 L. R. A. 207.

The case in which the agent, *e. g.*, a broker, was acting as a mere "middle-man," is also an exception to the rule forbidding compensation from both principals. See *post* § 651.

[34] See *ante* § 306; McKinley v. Williams (1896), 20 C. C. A. 312, 36 U. S. App. 749, 74 Fed. 94; Hofflin v. Moss (1895), 14 C. C. A. 459, 67 Fed. 440; Shaeffer v. Blair (1893), 149 U. S. 248, 13 Sup. Ct. 856, 37 L. Ed. 721; Hall v. Grambill (1899), 34 C. C. A. 190, 92 Fed. 32; Sutherland v. Guthrie (1920), 86 W. Va. 208, 103 S. E. 298; Jeffries v. Robbins (1903), 66 Kan. 427, 71 Pac. 852.

[35] See *ante* § 50; Buckley v. Humason (1892), 50 Minn. 195, 52 N. W. 385, 36 Am. St. R. 637, 16 L. R. A. 423; Denning v. Yount (1900), 62 Kan. 217, 61 Pac. 803, 50 L. R. A. 103; Holt v. Green (1873), 73 Pa. 198, 13 Am. Rep. 737; Johnson v. Hulings (1883), 103 Pa. 498, 49 Am. Rep. 131.

Many other cases falling within the same principle have already been noticed.[37]

§ 418. Where extra duties required.—An agent employed at a regular salary or wage cannot recover extra compensation because additional duties of the same kind are required of him, unless there was a promise or a legal custom to pay such extra compensation.[38]

Services of an entirely different sort stand upon a different footing.[39]

Possible claims for extra compensation may at times be precluded by apparently general and full settlements, for the period in which the alleged extra services were rendered, without making any demand for or claim to extra pay.[40]

§ 419. Where agent holds over.—Where an agent has been serving at a fixed compensation for a definite period, and continues after the expiration of that period without any new contract, the law will presume that he has continued for another like period, and at the same compensation.[41]

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[36] Harvey v. Merrill (1889), 150 Mass. 1, 22 N. E. 49, 15 Am. St. Rep. 159, 5 L. R. A. 200; Pope v. Hanke (1894), 155 Ill. 617, 40 N. E. 839, 28 L. R. A. 568; Samuels v. Oliver (1889), 130 Ill. 73, 22 N. E. 499.

[37] See *ante* § 47; *post* § 652.

[38] See Ross v. Hardin (1879), 79 N. Y. 84; Pew v. Gloucester Bank (1881), 130 Mass. 391; Schurr v. Savigny (1891), 85 Mich. 144, 48 N. W. 547; Lachine v. Manistique Ry. Co. (1901), 126 Mich. 519, 85 N. W. 1102; Muir v. Corset Co. (1909), 155 Mich. 441, 119 N. W. 589.

Promises to pay a public officer extra compensation for performing his official duties, are generally not enforceable. Decatur v. Vermillion (1875), 77 Ill. 315.

The fact that a statute may provide for the number of hours which shall constitute a legal day's work, does not change the rule if the statute does not provide for extra pay, and there is no agreement to pay it: Luske v. Hotchkiss (1870), 37 Conn. 219, 9 Am. Rep. 314; McCarthy v. Mayor (1884), 96 N. Y. 1, 48 Am. Rep. 601.

[39] That is, a promise *may* be implied from a request, as in § 405, *ante*, but the evidence must overthrow the presumption that the fixed salary or wage covers all the services rendered. See Ross v. Hardin, *supra*.

[40] See Bartlett v. Street Ry. Co. (1890), 82 Mich. 658, 46 N. W. 1034; Lachine v. Manistique Ry. Co., *supra;* Levi v. Reid (1899), 91 Ill. App. 430.

§ 420. Recoupment by principal.—In an action brought by the agent for the recovery of his compensation, the principal (instead of bringing an independent action) may recoup any actionable damages he may have sustained by reason of the agent's failure to perform his duty in the transaction of the business for which he seeks to recover compensation.[42]

Damages for losses caused to the principal by the agent's negligence, disobedience, disregard of instructions, loss of time, and the like, are within this rule.

The damages to be recouped must, however, result from some breach of the contract sued upon.[43]

2. *Re-imbursement and Indemnity of Agent.*

§ 421. Agent's right to re-imbursement.—An agent who, at the actual request of his principal, expends or advances his own money for the principal's benefit, is entitled to be reimbursed by the principal. Equally so, is the agent who advances money or incurs expense for the principal's benefit, upon an implied request, inferred from the fact that he was asked or directed by the principal to perform a service, in the proper execution of which, or as a proper incident to which, the disbursement or advance became suitable or necessary.[44]

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[41] See Wallace v. Floyd (1857), 29 Pa. 184, 72 Am. Dec. 620, Mechem's Cas. 525; Standard Oil Co. v. Gilbert (1890), 84 Ga. 714, 11 S. E. 491, 8 L. R. A. 410, Mechem's Cas. 273; Adams v. Fitzpatrick (1891), 125 N. Y. 124, 26 N. E. 143; Kelly v. Wheel Co. (1900), 62 Ohio St. 598, 57 N. E. 984; McCullough Iron Co. v. Carpenter (1887), 67 Md. 554, 11 Atl. 176; Grover & Baker S. M. Co. v. Bulkley (1868), 48 Ill. 189.

[42] See Mobile Ry. Co. v. Clanton (1877), 59 Ala. 392, 31 Am. Rep. 15; Wilson v. Smith (1895), 111 Ala. 170, 20 So. 134; Bixby v. Parsons (1882), 49 Conn. 483, 44 Am. Rep. 246; Blodgett v. Berlin Mills (1872), 52 N. H. 215; Johnson v. Creamery Ass'n (1895), 68 N. H. 437, 36 Atl. 13, 73 Am. St. R. 610.

No recoupment where no recovery could be had by direct action, *e. g.*, against an infant employee who breaks his contract: Widrig v. Taggart (1883), 51 Mich. 103, 16 N. W. 251, Wambaugh's Cas. 7.

[43] No recoupment at common law for losses caused by acts entirely disconnected with the employment; an independent action should be brought for those: See Nashville, etc., R. Co. v. Chumley (1871), 53 Tenn. (6 Heisk.) 325; Evans v. Hughey (1875), 76 Ill. 115; Mayberry v. Leech (1877), 58 Ala. 339.

Set off, being a statutory right, is governed by other considerations.

Thus if the agent were requested to buy goods for the principal for cash, but was not given the cash; or was requested to go upon a journey for the principal which involved the payment of railroad fares or hotel bills, but was not supplied with funds, or was directed to secure services or labor which must be paid for when rendered, but was not provided with the necessary funds; and the agent should fairly and reasonably advance his own money for the purpose, a claim for reimbursement would properly arise.

Clearly, on the other hand, he could not recover for officious or obtrusive payments, or for sums expended to cure or remove the results of his own misconduct or breach of duty, or for sums expended in promoting an enterprise which he knows to be illegal.[45]

§ 422. **Agent's right to indemnity.**—The agent is entitled to assume that if the principal requests or directs him to do an act for the principal which involves the pledging of the agent's own credit, as, for example, to buy goods, borrow money, or secure services upon the agent's own responsibility, the principal intends to indemnify the agent against any loss thereby. He is also entitled to assume that acts which the principal directs him to perform and which the agent does not know to be and are not obviously unjustified or illegal, may be performed without incurring loss or legal liability to third persons, or, at least, that if such loss or liability is incurred in carrying out the principal's directions, the principal intends to assume the responsibility. The agent is therefore entitled to be indemnified by the principal for any liability so incurred at the principal's request, and to be indemnified by the principal for any loss which the agent may sustain by reason of performing and as the proximate result of his performing, at the direction of the principal, any act which is not manifestly illegal and which the agent did not know to be wrong. In such cases the law implies a promise by the principal to indemnify the agent.[46]

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[44] See Clifton v. Ross (1894), 60 Ark. 97, 28 S. W. 1085, Goddard's Cas. 643; Arnold v. Arnold (1910), 83 Kan. 539, 112 Pac. 163; Blazo v. Gill (1894), 143 N. Y. 232, 38 N. E. 101; Monnet v. Notz (1891), 127 N. Y. 151, 27 N. E. 827; Lyon v. Sweeney (1892), 91 Mich. 478, 51 N. W. 1006; Perin v. Parker (1888), 126 Ill. 201, 18 N. E. 747, 9 Am. St. R. 571, 2 L. R. A. 336; Ward v. Tucker (1893), 7 Wash. 399, 35 Pac. 126, 1086; Bibb v. Allen (1892), 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819.

[45] See Child v. Morley (1800), 8 T. R. 610, Wambaugh's Cas. 741; Hurst v. Holding (1810), 3 Taunt. 32, Wambaugh's Cas. 744; Samuels v. Oliver (1889), 130 Ill. 73, 22 N. E. 499; Mohr v. Miesen (1891), 47 Minn. 228, 49 N. W. 862.

Within the same principle must doubtless be included cases in which the principal permits an agent to go on acting, after a revocation of the authority, known to the principal, but of which, as he knows, the agent is ignorant.

This does not, of course, extend to liabilities or losses caused solely by the agent's own misconduct or default;[47] nor to those which are in no way the result of the execution of the agency, or which are caused by the independent and unexpected wrongful acts of third persons for which the principal is in no wise responsible.

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[46] See D'Arcy v. Lyle (1813), 5 Binn. (Pa.) 441, Mechem's Cas. 542, Wambaugh's Cas. 747; Moore v. Appleton (1855), 26 Ala. 633, 34 Ala. 147, 73 Am. Dec. 448; Powell v. Newburgh (1822), 19 Johns. (N. Y.) 284, Goddard's Cas. 641; Beach v. Branch (1876), 57 Ga. 362; Searing v. Butler (1873), 69 Ill. 575; Guirney v. Railway Co. (1890), 43 Minn. 496, 46 N. W. 78, 19 Am. St. R. 256; Henderson v. Eckern (1911), 115 Minn. 410, 132 N. W. 715, Ann. Cas. 1912D, 989; Hoggan v. Cahoon (1903), 26 Utah 444, 73 Pac. 512, 99 Am. St. R. 837; First Nat. Bank v. Tenney (1891), 43 Ill. App. 544.

[47] See Duncan v. Hill (1873), L. R. 8 Exch. 242.

§ 423. —— **None where act illegal.**—But no promise to indemnify will be implied, and even an express promise will not be enforced, if the act directed to be done was one which the agent knew or must be presumed to have known was illegal.[48]

3. *Protection from Physical Injury.*

§ 424. **In general.**—The question of protection from physical injury arises usually where the relation is that known as Master and Servant, rather than Principal and Agent. While this book is primarily devoted to the latter relation, some consideration of the question arising in the other seems not to be out of place. It has become a great subject, with a vast number of cases, and many refinements. It can only be outlined here.

§ 425. **Risks incident to the business—Master generally not liable.**—Every undertaking for the rendition of services is attended with more or less of risk incident to the business itself, even when carried on with ordinary and reasonable care. These risks are usually as well known to the servant as to the master. Often the servant knows them better than the master. By the hypothesis they result from no fault or neglect of the master; but from the very nature of the thing to be done, or the circumstances under which it must be done. By the very act of accepting the employment, without stipulating to the contrary, it is held that the servant assumes the risk of injury from such dangers, and if he is injured by them, the master, otherwise free from fault, will not be liable.[49]

§ 426. **Master responsible for his own negligence.**—On the other hand, if the servant is injured by the personal negligence of the master, occurring, *e. g.*, where servant and master work side by side, as they often do upon the farm and in smaller enterprises, the master will be personally liable to the servant. Such injuries do not arise from the inherent nature of the work, but from the negligence of the one who caused the injury; and the servant, by merely accepting the employment, has not assumed that risk.[50]

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[48] See Coventry v. Barton (1819), 17 Johns. (N. Y.) 142, 8 Am. Dec. 376; Pope v. Hanke (1894), 155 Ill. 617, 40 N. E. 839, 28 L. R. A. 568.

[49] See Sweeney v. Central Pac. R. Co. (1880), 57 Cal. 15; Orman v. Mannix (1892), 17 Colo. 564, 30 Pac. 1037, 31 Am. St. R. 340, 17 L. R. A. 602; Hayden v. Smithville Mfg. Co. (1861), 29 Conn. 548; Sweeney v. Berlin, etc., Co. (1886), 101 N. Y. 520, 5 N. E. 358, 54 Am. Rep. 722; Lewis v. Seifert (1887), 116 Pa. 628, 11 Atl. 514, 2 Am. St. R. 631.

The question of the master's responsibility for his own negligence may arise in a variety of cases with reference to injuries from places, agencies and instrumentalities contributed to the situation by the master and controlled by him. As to these, certain duties are said to attach to the master, which will now be considered.

§ 427. Master's duty as to place of work.—The master does not always furnish the place to work. When he does undertake to furnish it, as he so commonly does in the case of shop, mine, farm, yards, quarry, and other similar places, and no other agreement respecting it is made, the law entitles the servant to expect, and deems the master to assure him, that the master will exercise reasonable care to furnish and maintain, so far as such care can secure it, reasonably safe conditions as to the place in which to work.[51] The law does not demand perfection, or make the master a guarantor of safety. If the master has performed the duty as thus stated, and the servant nevertheless is injured, the master is not liable. The servant assumes such a risk. If the master has not performed this duty, and the servant, by reason thereof, and without contributory negligence on his own part, is injured, the master will be liable to an action for damages.[52]

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[50] See Rhoades v. Varney (1898), 91 Me. 222, 39 Atl. 552; Ashworth v. Stanwix (1861), 3 E. & E. 701, Wambaugh's Cas. 795.

[51] See Louisville, etc., R. Co. v. Stutts (1894), 105 Ala. 368, 17 So. 29, 53 Am. St. R. 127; Kennedy v. Chase (1898), 119 Cal. 367, 52 Pac. 33, 63 Am. St. R. 153; Williams v. Mining Co. (1906), 37 Colo. 62, 86 Pac. 337, 7 L. R. A. (N. S.) 1170, 11 A. & E. Anno. Cas. 111; McElligott v. Randolph (1891), 61 Conn. 157, 22 Atl. 1094, 29 Am. St. R. 181; Bowden v. Derby (1903), 97 Me. 536, 55 Atl. 417, 94 Am. St. R. 516, 63 L. R. A. 223; Downey v. Mining Co. (1902), 24 Utah 431, 68 Pac. 414, 91 Am. St. R. 798; Western Stone Co. v. Muscial (1902), 196 Ill. 382, 63 N. E. 664, 89 Am. St. R. 325.

If, in the place provided, there are unexpected dangers existing or impending, known to the master but not to the servant, and not obvious to ordinary observation, the master owes a duty to give the servant warning.[53] This duty of warning will be enhanced in case of the youth of the servant, or his known ignorance or inexperience.[54]

§ 428. —— **Qualifications.**—The duty as to the safe place does not extend to places into which the servant had no duty or invitation to go, and into which the master had no reasonable ground to anticipate that he would go, whether the servant went there merely out of curiosity, a desire to do something for his own interests, or even to perform service which was not a part of his undertaking and as to which he was an uncalled for and unexpected volunteer.[55]

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[52] The duty of the master is not absolute. It extends no further than to exercise reasonable and ordinary care to furnish a reasonably safe place. See Gaither v. Clement (1922), 183 N. Car. 450, 111 S. E. 782.

[53] See Louisville, etc., R. Co. v. Hall (1888), 87 Ala. 708, 6 So. 277, 13 Am. St. R. 84, 4 L. R. A. 710; Burnside v. Peterson (1908), 43 Colo. 382, 96 Pac. 256, 17 L. R. A. (N. S.) 76; Louisville, etc., R. Co. v. Wright (1888), 115 Ind. 378, 16 N. E. 145, 17 N. E. 584, 7 Am. St. R. 432; Ribich v. Smelting Co. (1900), 123 Mich. 401, 82 N. W. 279, 81 Am. St. R. 215, 48 L. R. A. 649; Brennan v. Gordon (1890), 118 N. Y. 489, 23 N. E. 810, 16 Am. St. R. 775, 8 L. R. A. 818; Hewett v. Hospital Ass'n (1906), 73 N. H. 556, 64 Atl. 190, 7 L. R. A. (N. S.) 496; Blaisdell v. Paper Co. (1910), 75 N. H. 497, 77 Atl. 485, 139 Am. St. R. 735.

The master's decision to start some other enterprise or to set free some force which he controls, which will render the place unsafe, may impose a duty of warning. See Cook v. Mfg. Co. (1922), 183 N. Car. 48, 110 S. E. 608.

[54] See Tedford v. Elec. Co. (1901), 134 Cal. 76, 66 Pac. 76, 54 L. R. A. 85; Ingerman v. Moore (1891), 90 Cal. 410, 27 Pac. 306, 25 Am. St. R. 138; May v. Smith (1893), 92 Ga. 95, 18 S. E. 360, 44 Am. St. R. 84; Norton v. Volzke (1895), 158 Ill. 402, 41 N. E. 1085, 49 Am. St. R. 167; Meier v. Way (1907), 136 Iowa 302, 111 N. W. 420, 125 Am. St. R. 254; Ciriack v. Woolen Co. (1890), 151 Mass. 152, 23 N. E. 829, 21 Am. St. R. 438, 6 L. R. A. 733; Greenberg v. Lumber Co. (1895), 90 Wis. 225, 63 N. W. 93, 48 Am. St. R. 911, 28 L. R. A. 439.

Duty to warn non-delegable: Brice v. Salt Co. (1908), 79 Kan. 110, 98 Pac. 768, 131 Am. St. R. 284, 19 L. R. A. (N. S.) 749; Anderson v. Coal Co. (1909), 108 Minn. 455, 122 N. W. 794, 26 L. R. A. (N. S.) 624.

For obvious reasons, the duty as to the safe place will be much modified in the cases in which, as part of their work and as it progresses, the servants are to construct the place to work,[56] or the facilities or appliances for the work, as is often true of scaffolds, staging, platforms, and the like. Here if the master supplies suitable materials and labor, he is usually deemed to have performed his full duty; and the men who build these structures and the men who use them are likely to be fellow-servants, and one can not recover from the master if he is injured by the negligence of another.[57]

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[55] See Severy v. Nickerson (1876), 120 Mass. 306, 21 Am. Rep. 514; Pioneer Min. Co. v. Tallay (1907), 152 Ala. 162, 43 So. 800, 12 L. R. A. (N. S.) 861; Kennedy v. Chase (1898), 119 Cal. 637, 52 Pac. 33, 63 Am. St. R. 153; O'Brien v. Steel Co. (1889), 100 Mo. 182, 13 S. W. 402, 18 Am. St. R. 536; McCue v. Starch Co. (1894), 142 N. Y. 106, 36 N. E. 809; Buel v. Hines (1922), 218 Mich. 353, 188 N. W. 422.

[56] Where the workmen are to make their own place to work as they go along, as often in the case of mines, quarries, clearings, and the like, the liability of the master as to furnishing a safe place is obviously limited by the inherent risks of making the place. See Consolidated Coal Co. v. Clay (1894), 51 Ohio 542, 38 N. E. 610, 25 L. R. A. 848; Mielke v. Railway Co. (1899), 103 Wis. 1, 79 N. W. 22, 74 Am. St. R. 834.

[57] If the master undertakes to supply scaffolds, for example, the master's duty will attach to these; so where they are constructed under his direction, or he adopts for his own uses one erected for another purpose. See McBeath v. Rawle (1901), 192 Ill. 626, 61 N. E. 847, 69 L. R. A. 697; Blomquist v. Chicago, etc., Ry. Co. (1895), 60 Minn. 426, 62 N. W. 818; Cheatham v. Hogan (1908), 50 Wash. 465, 97 Pac. 499, 22 L. R. A. (N. S.) 951.

If he merely undertakes to supply materials, his duty will not ordinarily extend beyond supplying reasonably suitable ones. He would be liable for not doing that: Farrell v. Machine Co. (1904), 77 Conn. 484, 59 Atl. 611, 107 Am. St. R. 45, 68 L. R. A. 239; Donahue v. Buck (1908), 197 Mass. 550, 83 N. E. 1090, 18 L. R. A. (N. S.) 476.

But if the workmen are to build

Much the same sort of cases is presented where the danger is not so much in the place as in the very nature of the work being done, as in the case of excavating, erecting buildings, tearing down buildings, and the like;[58] and also in the case of repairing or restoring safe conditions after accidents, wrecks, floods, fires, and the like.[59] It would be unreasonable to expect the same degree of safety in a place which the servant is then laboring to make safe, as in a place in which no disturbance has occurred.

§ 429. **Duty as to tools, machinery, appliance, and the like.**—Sometimes the servant furnishes his own tools and equipment. When the master undertakes to supply them, and no other agreement is made respecting the matter, the law entitles the servant

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their own scaffolds, etc., as the work progresses and as part of it, those using them will usually be fellow servants of those building them. See Beesley v. Wheeler (1894), 103 Mich. 196, 61 N. W. 658, 27 L. R. A. 266; Lambert v. Pulp Co. (1900), 72 Vt. 278, 47 Atl. 1085; Gombert v. McKay (1911), 201 N. Y. 27, 94 N. E. 186, 42 L. R. A. (N. S.) 1234; Ross v. Walker (1891), 139 Pa. 42, 21 Atl. 157, 159, 23 Am. St. R. 160; Buck v. Zinc Co. (1902), 204 Pa. 132, 53 Atl. 740, 60 L. R. A. 453; Haakensen v. Fibre Co. (1912), 76 N. H. 443, 83 Atl. 804, Ann. Cas. 1913B, 1122; Leishman v. Iron Works (1905), 148 Cal. 274, 83 Pac. 30, 113 Am. St. R. 243, 3 L. R. A. (N. S.) 500; Metzler v. McKenzie (1904), 34 Wash. 470, 76 Pac. 114; Swanson v. Engineering Co. (1912), 67 Wash. 128, 120 Pac. 880.

[58] See Maloney v. Railway Co. (1907), 39 Colo. 384, 89 Pac. 649, 121 Am. St. R. 180, 12 Ann. Cas. 621, 19 L. R. A. (N. S.) 348; Citrone v. Construction Co. (1907), 188 N. Y. 339, 80 N. E. 1092, 19 L. R. A. (N. S.) 340; Russell v. Railway Co. (1907), 188 N. Y. 344, 81 N. E. 122, 19 L. R. A. (N. S.) 344; Petaja v. Mining Co. (1895), 106 Mich. 463, 64 N. W. 335, 66 N. W. 951, 58 Am. St. R. 505, 32 L. R. A. 435; Miller v. Moran (1905), 39 Wash. 631, 81 Pac. 1089, 109 Am. St. R. 917, 1 L. R. A. (N. S.) 283; Moore v. Railway Co. (1895), 167 Pa. 495, 31 Atl. 734; Oleson v. Mining Co. (1901), 115 Iowa 74, 87 N. W. 736.

[59] See Arkansas Land Co. v. Cooper (1922), — Ark. —, 245 S. W. 192; Dartmouth Spinning Co. v. Achard (1889), 84 Ga. 14, 10 S. E. 449, 6 L. R. A. 190; Kletschka v. Railroad Co. (1900), 80 Minn. 238, 83 N. W. 133; Negle v. Railroad Co. (1906), 185 N. Y. 270, 77 N. E. 1064, 25 L. R. A. (N. S.) 321; Vaughn v. Railway Co. (1890), 83 Cal. 18, 23 Pac. 215.

to expect, and deems the master to assure him, that the master will exercise reasonable care to supply, maintain, and keep in repair, tools, machinery, implements, appliances, and the like, which, so far as such care will secure it, shall be reasonably safe.[60] This rule does not demand the very latest or the most improved, or make the master a guarantor of safety.[61] If the master performs his duty in this regard, and the servant is nevertheless injured, the master is not responsible. The servant assumes that risk. If the master does not perform his duty, and the servant is injured thereby, without contributory negligence on his own part, the master will be liable to him for damages.

§ 430. —— If there are concealed dangers, known to the master but not to the servant, and not obvious upon ordinary observation, a duty of warning arises, as in the case of the place to work.[62]

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[60] See Louisville, etc., R. Co. v. Stutts (1894), 105 Ala. 368, 17 So. 29, 53 Am. St. R. 127; Last Chance Min. Co. v. Ames (1896), 23 Colo. 167, 47 Pac. 382; Brazil Coal Co. v. Gibson (1902), 160 Ind. 319, 66 N. E. 882, 98 Am. St. R. 281; Hannibal, etc., R. Co. v. Kanaley (1888), 39 Kan. 1, 17 Pac. 324; Griffin v. Railroad Co. (1889), 148 Mass. 143, 19 N. E. 166, 12 Am. St. R. 526, 1 L. R. A. 698; Johnson v. Spear (1889), 76 Mich. 139, 42 N. W. 1092, 15 Am. St. R. 298; Service v. Shoneman (1900), 196 Pa. 63, 46 Atl. 292, 79 Am. St. R. 689, 69 L. R. A. 792; Purdy v. Westinghouse Co. (1900), 197 Pa. 257, 47 Atl. 237, 80 Am. St. R. 816, 51 L. R. A. 881; International, etc., Ry. Co. v. Kernan (1890), 78 Tex. 294, 14 S. W. 668, 22 Am. St. R. 52, 9 L. R. A. 703; Richmond, etc., Ry. Co. v. Williams (1889), 86 Va. 165, 9 S. E. 990, 19 Am. St. R. 876.

If the master was negligent, the fact that the negligence of a fellow-servant also contributed to cause the plaintiff's injury, does not release the master: Griffin v. Railroad Co., *supra;* Norfolk, etc., R. Co. v. Nuckolls (1895), 91 Va. 193, 21 S. E. 342.

[61] See Davis v. Augusta Factory (1893), 92 Ga. 712, 18 S. E. 974; Chicago, etc., R. Co. v. Driscoll (1898), 176 Ill. 330, 52 N. E. 921; Burns v. Railway Co. (1886), 69 Iowa 150, 30 N. W. 25, 58 Am. Rep. 227; Wormell v. Railroad Co. (1887), 79 Me. 397, 10 Atl. 49, 1 Am. St. R. 321; Ross v. Cordage Co. (1895), 164 Mass. 257, 41 N. E. 284, 49 Am. St. R. 459.

[62] See *ante* § 427; Dowling v. Allen (1881), 74 Mo. 13, 41 Am.

The duty to repair and maintain obviously includes inspection where that is necessary, and replacement or renewal where that is required.

As in the case of the place to work, this duty as to tools, etc., does not extend to those which the servant injured was not required, invited or expected to use. So if a reasonably safe tool, etc., is furnished, the fact that the servant so carelessly or unreasonably or unexpectedly uses it as to sustain injury, does not make the master liable.

§ 431. Duty as to employing other servants.—When the master invites a servant to serve in an employment in which other servants are also known to be employed, and no other agreement is made respecting the matter, the servant has the right to expect, and the master is deemed in law to assure him, that in employing and retaining such other servants to serve with him in the same employment, the master will exercise reasonable care to employ and retain only such as are reasonably competent and suitable, so far as that may affect the safety of the servant in question.[63] If the master does that, and nevertheless the servant is injured by the negligence of such other servant, the master is not liable. The risk of such an injury by a fellow-servant is one of those which the servant assumes. If the master does not perform his duty in this regard and the servant is injured thereby without contributory negligence on his own part, the servant so injured may recover damages from the master.[64] The so called "fellow-servant" rule, hereafter considered, does not exempt the master from liability for his own negligence in employing or retaining such fellow-servants.

Rep. 298; Fleming v. Paper Co. (1908), 135 Wis. 157, 114 N. W. 841, 15 L. R. A. (N. S.) 701.

[63] See First Nat. Bank v. Chandler (1905), 144 Ala. 286, 39 So. 882, 113 Am. St. R. 39; Still v. Railway Co. (1908), 154 Cal. 559, 48 Pac. 672, 129 Am. St. R. 177, 20 L. R. A. 322; Western Stone Co. v. Whalen (1894), 151 Ill. 472, 38 N. E. 241, 42 Am. St. R. 244; Conover v. Neher-Ross Co. (1905), 38 Wash. 172, 80 Pac. 281, 107 Am. St. R. 841; Williams v. Kimberly (1907), 131 Wis. 303, 111 N. W. 481, 120 Am. St. R. 1049, 10 L. R. A. (N. S.) 1043, 11 Ann. Cas. 622.

[64] See cases *supra.*

§ 432. —— So far as the number of the other servants is concerned, where the reasonable safety of one servant at his task depends upon there being an adequate number of other servants of the master at their respective places, the servant who undertakes that task, without any other agreement, is entitled to assume that the master will exercise reasonable care to supply a reasonably adequate number of others, so that his task may be performed with reasonable safety.[65]

Here, again, the master is not a guarantor of safety. His duty is to use reasonable care, and a failure in fact may exist without the master's fault, measured by that duty. He is then not liable.

§ 433. Duty as to rules, regulations and superintendence.—Where the business to be carried on is a complex one, and dangerous unless regulated and superintended, as in the case of most railroads, mines, and the like, it is the duty of the master to exercise reasonable care to make and promulgate such time tables, schedules, rules, and regulations as are necessary and suitable to enable the business to be carried on with reasonable safety, and then to exercise like care to see that such rules, regulations, etc., are enforced and obeyed.[66] If, from time to time, they are altered, there will be a fresh duty of promulgation. Even though the whole business may not require special regulation, some portions of it may, or even particular operations.[67] Skilled superintendence of the work as it progresses may also be necessary in order to make the work reasonably safe; and it is the master's function to supply this.[68]

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[65] See Flike v. Boston & Alb. R. Co. (1873), 53 N. Y. 549, 13 Am. Rep. 545, Wambaugh's Cas. 853; Cheeney v. Steamship Co. (1893), 92 Ga. 726, 19 S. E. 33, 44 Am. St. R. 113; Supple v. Agnew (1901), 191 Ill. 439, 61 N. E. 392; Jones v. Cotton Mills (1886), 82 Va. 140, 3 Am. St. R. 92; Johnson v. Ashland Water Co. (1888), 71 Wis. 553, 37 N. W. 823, 5 Am. St. R. 243.

[66] See Sprague v. Railroad Co. (1896), 68 Conn. 345, 36 Atl. 791, 37 L. R. A. 638; Fitzgerald v. Railway Co. (1908), 200 Mass. 105, 85 N. E. 911, 19 L. R. A. (N. S.) 239; Reagan v. Railroad Co. (1887), 93 Mo. 348, 6 S. W. 371, 3 Am. St. R. 542; Abel v. Railroad Co. (1891), 128 N. Y. 662, 28 N. E. 663; Pool v. Railroad Co. (1899), 20 Utah 210, 58 Pac. 326; Merrill v. Railroad Co. (1905), 29 Utah 264, 81 Pac. 85, 110 Am. St. R. 695; Richlands Iron Co. v. Elkins (1897), 90 Va. 349, 17 S. E. 890; Little Miami R. Co. v. Stevens (1851), 20 Ohio 415, Wambaugh's Cas. 824.

§ 434. These duties non-delegable—Vice-Principal.—These duties of the master are often said to be non-delegable, meaning by this that if the master, instead of performing his duties in person, confides their performance to a superintendent, manager, or other agent (hence often called a vice-principal), and this agent, however carefully he may have been selected, does not perform the master's duties so confided to him, the master will be liable for an injury to his servant caused by such nonperformance.[69]

Such an agent, in his undertaking to perform these duties of the master, is not a fellow-servant with the servants for whose protection the duties were imposed, and hence his neglect to perform them is not negligence within the operation of the fellow-servant rule.

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[67] "In a business conducted by many employees performing work independently of each other and in which the work of one becomes periodically dangerous to another, it is the duty of the master to provide reasonable regulations against such danger, and amongst these is promulgating rules and regulations for the giving of warning, to the persons likely to be endangered, when such dangerous acts are about to be performed." Polaski v. Coal Dock Co. (1908), 134 Wis. 259, 114 N. W. 437, 14 L. R. A. (N. S.) 952.

There is ordinarily no duty to warn of occasional dangers which the servant knows fully as well as the master: Ahern v. Mfg. Co. (1908), 75 N. H. 99, 71 Atl. 213, 21 L. R. A. (N. S.) 89.

[68] See McElligott v. Randolph (1891), 61 Conn. 157, 22 Atl. 1094, 29 Am. St. R. 181; Trainor v. Railroad Co. (1890), 137 Pa. 148, 20 Atl. 632; Engelking v. Spokane (1910), 59 Wash. 446, 110 Pac. 25, 29 L. R. A. (N. S.) 481.

[69] See Wilson v. Linen Co. (1883), 50 Conn. 433, 47 Am. Rep. 653; Baier v. Selke, (1904), 211 Ill. 512, 71 N. E. 1074, 103 Am. St. R. 208; Brice v. Salt Co. (1908), 79 Kan. 110, 98 Pac. 768, 131 Am. St. R. 284, 19 L. R. A. (N. S.) 749; Shanny v. Mills (1876), 66 Me. 420; Brown v. Gilchrist (1890), 80 Mich. 56, 45 N. W. 82, 20 Am. St. R. 496; Grant v. Nihill (1922), — Mont. —, 210 Pac. 914; Bushby v. Railroad Co. (1887), 107 N. Y. 374, 14 N. E. 407, 1 Am. St. R. 844; Clavin v. Tinkham Co. (1909), 29 R. I. 599, 73 Atl. 342, 132 Am. St. R. 836; Sullivan v. Wood (1906), 43 Wash. 259, 86 Pac. 629, 117 Am. St. R. 1047; Massy v. Railway Co. (1910), 143 Wis. 220, 126 N. W. 544, 139 Am. St. R. 1096, 4 L. R. A. (N. S.) 814.

§ 435. —— The same doctrine is usually applied where the master, instead of performing in person, entrusts performance of his duties to an independent contractor. If the latter does not perform, the master, by the weight of authority, will be liable to a servant injured because of such non-performance.[70] A few cases are *contra.*[71]

According to the prevailing view, the master would not perform his whole duty merely by confiding performance even to a reputable contractor: he must still exercise reasonable care to see that the latter has performed.

§ 436. **Negligence of a fellow-servant.**—Although the master is liable to a servant for an injury caused by the master's personal negligence, and although he is liable to a third person for an injury caused by the negligence of his servant within the course of his employment, it is the settled doctrine of English and American law (where not changed by statute as hereinafter pointed out), that a master, who has exercised due care in the selection and retention of his servants, is not liable to one of his servants for an injury caused by another of his servants in the same employment, although the latter servant was at the time acting within the course of that employment.[72] For such an injury, the servant injured must look for redress to the servant who injured him. This is the so-called "fellow-servant rule."

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[70] See Pullman Car Co. v. Laack (1892), 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; Bernheimer v. Bager (1908), 108 Md. 551, 70 Atl. 91, 129 Am. St. R. 458; Sweat v. Railroad Co. (1892), 156 Mass. 284, 31 N. E. 296; Burnes v. Railway Co. (1895), 129 Mo. 41, 31 S. W. 347; Story v. Railroad Co. (1900), 70 N. H. 364, 48 Atl. 288; Ortlip v. Traction Co. (1901), 198 Pa. 586, 48 Atl. 497; Moran v. Engine Co. (1899), 21 R. I. 386, 43 Atl. 874, 45 L. R. A. 267; Walton v. Miller (1909), 109 Va. 210, 63 S. E. 458, 132 Am. St. R. 908; Vickers v. Railway Co. (1908), 64 W. Va. 474, 63 S. E. 367, 131 Am. St. R. 929, 20 L. R. A. (N. S.) 793.

[71] See Devlin v. Smith (1882), 89 N. Y. 470, 11 Abb. N. C. 322, 42 Am. Rep. 311; Norfolk, etc., R. Co. v. Stevens (1899), 97 Va. 631, 34 S. E. 525, 46 L. R. A. 367, distinguished in Walton v. Miller, *supra.*

§ 437. —— Who are fellow-servants.—By the rule generally prevailing, all of the servants employed by the same master, and engaged in furthering the same general enterprise, are to be deemed fellow-servants. If they are employed upon the same enterprise but by different masters,—as in the case of the servants of different contractors engaged in erecting the same building,—while all the servants of each contractor will be fellow-servants as to each other, the servants employed by one contractor will not be fellow-servants with the servants employed by another contractor.[73] If they are all employed by the same master but are engaged upon entirely distinct enterprises, as where the common master is carrying on several unconnected and distinct lines of business, those employed in one of such distinct occupations will not be fellow-servants with those employed in another.[74]

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[72] See Priestley v. Fowler (1837), 3 Mees. & Wels. 1, Wambaugh's Cas. 773; Murray v. Railroad Co. (1841), 1 McMul. (S. Car.) 385, 36 Am. Dec. 268, Wambaugh's Cas. 777; Farwell v. Boston, etc., R. Co. (1842), 4 Metc. (Mass.) 49, 38 Am. Dec. 339, Wambaugh's Cas. 786 (This is the leading American case); Tenn. R. Co. v. Bridges (1905), 144 Ala. 229, 39 So. 902, 113 Am. St. R. 35; Southern Pac. R. Co. v. McGill (1896), 5 Ariz. 36, 44 Pac. 302; St. Louis, etc., R. Co. v. Triplett (1891), 54 Ark. 289, 15 S. W. 831, 16 S. W. 266, 11 L. R. A. 773; Beeson v. Mining Co. (1880), 57 Cal. 20; Colorado, etc., R. Co. v. Ogden (1877), 3 Colo. 499; Peterson v. Railroad Co. (1904), 77 Conn. 351, 59 Atl. 502; Parrish v. Railroad Co. (1891), 28 Fla. 251, 9 So. 696; Larsen v. Le Doux (1905), 11 Idaho 49, 81 Pac. 600; Indianapolis Transit Co. v. Foreman (1904), 162 Ind. 85, 69 N. E. 669, 102 Am. St. R. 185; Collingwood v. Fuel Co. (1904), 125 Iowa 537, 101 N. W. 283; Atchison Bridge Co. v. Miller (1905), 71 Kan. 13, 80 Pac. 18, 1 L. R. A. (N. S.) 682; Louisville, etc., R. Co. v. Cavens (1873), 9 Bush. (Ky.) 559; Blake v. Railroad Co. (1879), 70 Me. 60, 35 Am. Rep. 297; Smith v. Railway Co. (1881), 46 Mich. 258, 9 N. W. 273, 41 Am. Rep. 161; Brown v. Railroad Co. (1880), 27 Minn. 162, 6 N. W. 484, 38 Am. Rep. 285; Mcmaster v. Railroad Co. (1887), 65 Miss. 264, 4 So. 59, 7 Am. St. R. 653; Hastings v. Railroad Co. (1896), 18 Mont. 493, 46 Pac. 264; Enright v. Oliver (1903), 69 N. J. L. 357, 55 Atl. 277, 101 Am. St. R. 710; Cowles v. Railroad Co. (1881), 84 N. Car. 309, 37 Am. Rep. 620; Metzler v. McKenzie (1904), 34 Wash. 470, 76 Pac. 114; Brabbits v. Railroad Co. (1875), 38 Wis. 289.

The rule applies to infant servants: Houston, etc., R. Co. v. Miller (1879), 51 Tex. 270, Wambaugh's Cas. 819; Fisk v. Railroad Co. (1887), 72 Cal. 38, 13 Pac. 144, 1 Am. St. R. 22; Ohio, etc., R. Co. v. Hammersley (1867), 28 Ind. 371.

§ 438. —— **Departmental rule.**—In a few States, servants engaged upon a large enterprise, divided into distinct departments, as in the case of a railroad or a great factory with various departments of labor, are not to be regarded as fellow-servants unless they belong to the same department.[75] This is commonly spoken of as the "departmental rule." It has not been found easily workable, and it is not generally recognized.

§ 439. —— **Association rule.**—In a few States, like Illinois, they are not fellow-servants unless, at the time of the injury, the servant injured and the one by whose negligence he was injured were "directly co-operating with each other in a particular work," or "their usual duties must be such as to bring them into such habitual association as will afford them the power and opportunity of exercising an influence, each upon the other, promotive of their mutual safety.''[76] This is sometimes spoken of as the ''association'' or ''consociation rule.'' This rule or something like it is followed in a number of States,[77] but is not generally adopted.

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[73] Swainson v. Railway Co. (1878), L. R. 3 Exc. Div. 341, Wambaugh's Cas. 813; Morgan v. Smith (1893), 159 Mass. 570, 35 N. E. 101; Kelly v. Tyra (1908), 103 Minn. 176, 114 N. W. 750, 115 N. W. 636, 17 L. R. A. (N. S.) 334; Coates v. Chapman (1900), 195 Pa. 109, 45 Atl. 676.

If, however, the general servant of one contractor has become for the time being the special servant of another (see § 503,) he would, during that time for the work involved, become a fellow servant with the other servants of that contractor. See Murray v. Dwight (1900), 161 N. Y. 301, 55 N. E. 901, 48 L. R. A. 673.

[74] See McTaggart v. Eastman (1899), 27 N. Y. Misc. 184, 57 N. Y. S. 222, 28 *id.* 127, 58 N. Y. Supp. 1118; Bain v. Machine Works (1885), 75 Ga. 718.

[75] See Levins v. Bancroft (1905), 114 La. 105, 38 So. 72; Louisville R. Co. v. Dillard (1904), 114 Tenn. 240, 86 S. W. 313, 108 Am. St. R. 894, 69 L. R. A. 746; Pool v. Railway Co. (1899), 20 Utah 210, 58 Pac. 326.

§ 440. —— **Superior servant rule.**—It has sometimes been held that where one servant, who might otherwise be regarded as a fellow-servant, was given by the master a power of direction or control over the other servants while engaged in the performance of the work—even though he did not rise to the rank of what is usually called a vice-principal—he was, merely by reason of such power of control, and as to all injuries resulting from the manner in which he exercised it, not to be regarded as a fellow-servant with those working with and under him. Such a servant has been sometimes designated as a ''superior servant,'' not a fellow servant.[78]

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[76] See Chicago, etc., R. Co. v. Moranda (1879), 93 Ill. 302, 34 Am. Rep. 168; Illinois Steel Co. v. Bauman (1899), 178 Ill. 351, 53 N. E. 107, 69 Am. St. R. 316; Chicago City Ry. Co. v. Leach (1904), 208 Ill. 198, 70 N. E. 222, 100 Am. St. R. 216; Illinois Steel Co. v. Ziemkowski (1906), 220 Ill. 324, 77 N. E. 190, 4 L. R. A. (N. S.) 1161; Aldrich v. Railroad Co. (1909), 241 Ill. 402, 89 N. E. 702, 132 Am. St. R. 220.

[77] In Missouri, see Grattis v. Railway Co. (1899), 153 Mo. 380, 55 S. W. 108, 77 Am. St. R. 721, 48 L. R. A. 399; Koerner v. Car Co. (1907), 209 Mo. 141, 107 S. W. 481, 17 L. R. A. (N. S.) 292; McMurray v. Railroad Co. (1909), 225 Mo. 272, 125 S. W. 751. In Kentucky, see Louisville, etc., R. Co. v. Lowe (1904), 118 Ky. 260, 25 Ky. L. Rep. 2317, 80 S. W. 768, 65 L. R. A. 122; Louisville, etc., R. Co. v. Brown (1907), 127 Ky. 732, 106 S. W. 795, 13 L. R. A. (N. S.) 1135; Louisville, etc., R. Co. v. Hibbitt (1910), 139 Ky. 43, 129 S. W. 319, 139 Am. St. R. 464. In Nebraska, see Union Pac. R. Co. v. Erickson (1894), 41 Neb. 1, 59 N. W. 347, 29 L. R. A. 137; Irwin v. Gould (1916), 99 Neb. 283, 156 N. W. 503.

[78] It is, for example, a master's duty to furnish the place to work; to supply tools, machinery and appliances; to employ and discharge servants; to make the necessary *general* rules, schedules, time-tables, etc.; and to generally superintend and regulate the en-

It has, however, come pretty generally to be recognized that the giving of a certain class of directions or orders, *i. e.*, those required as the work proceeds as a condition of its orderly con-

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terprise. One to whom these duties or any of them may be delegated would usually be a vice-principal. Thus, the general manager of a railroad, for example.

But what about the conductor of a freight train, who may signal the engineer when to start or stop; who may send a brakeman back with a flag or torpedo to guard against an approaching train; who may direct cars to be set out at sidings; who may direct a brakeman to make a coupling or apply brakes; and the like? Is he a manager or a worker? Or a section boss who goes out with a gang of men to work, under his direction, upon the road bed or tracks?

The most potent influence in establishing (though not the originator of) the rule that such a person was either a vice-principal or at least a superior servant, was doubtless the case of Chicago, etc., Ry. Co. v. Ross (1884), 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787 (often referred to as "the Ross case") which held (four justices dissenting) that the conductor "represented" the company, which was therefore responsible for his negligence. This case was later overruled, in fact, in Baltimore, etc., R. Co. v. Baugh (1893), 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772, Wambaugh's Cas. 872, and formally in New England R. Co. v. Conroy (1899), 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181; but before it had been repudiated it was followed by a number of State courts, some of which later overruled their own decisions, but some of which refused to follow the Supreme court in its later views.

See Bloyd v. Railroad Co. (1893), 58 Ark. 66, 22 S. W. 1089, 41 Am. St. R. 85; Taylor v. Marble Co. (1896), 99 Ga. 512, 27 S. E. 768, 59 Am. St. R. 238; Walker v. Gillett (1898), 59 Kan. 214, 52 Pac. 442; Williams v. Lumber Co. (1910), 125 La. 1087, 52 So. 167, 136 Am. St. R. 365, 19 Ann. Cas. 1244; Bell v. Rocheford (1907), 78 Neb. 304, 110 N. W. 646, 126 Am. St. R. 595; Purcell v. Railway Co. (1896), 119 N. Car. 728, 26 S. E. 161; Berea Stone Co. v. Kraft (1877), 31 Ohio St. 287, 27 Am. Rep. 510; Electric Ry. Co. v. Lawson (1898), 101 Tenn. 406, 47 S. W. 489; Gann v. Railroad Co. (1898), 101 Tenn. 380, 47 S. W. 493, 70 Am. St. 687; Louisville R. Co. v. Dillard (1904), 114 Tenn. 240, 86 S. W. 313, 108 Am. St. R. 894, 69 L. R. A. 746; Sweeney v. Railroad Co. (1892), 84 Tex. 433, 19 S. W. 555, 31 Am. St. R. 71; Andreson v. Depot Co. (1892), 8 Utah 128, 30 Pac. 305; Johnson v. Coal Co. (1904), 28 Utah 46, 76 Pac. 1089, 67 L. R. A. 506; Olson v. Erickson (1909), 53 Wash. 458, 102 Pac. 400.

duct and as a necessity of its various exigencies—as distinguished from that more general planning and direction which belongs to those who shape the policies but do not do the work—is just as much a part of the work as the merely physical or muscular effort, and that the person who gives them may be just as much a worker as those whose present movements he directs. It is a question, not merely of rank or authority, but of the nature of the thing done.[79] It is also recognized that the same person may at one moment be even a vice-principal as to one aspect of the work, and at the next moment be merely a worker and hence a fellow-servant.

The cases which adopt a superior servant doctrine are difficult to reconcile; even those in the same State are often in great conflict. The weight of authority is opposed to that doctrine.

§ 441. —— What risks included in fellow-servant rule.—The risks which are included in the fellow-servant rule, as has been stated, are those arising to the servant while in the service from fellow-servants within the same service. The servant injured must at the time have been in the service. If he had temporarily withdrawn, as by taking a day off, or if the service begins only when he gets to a certain place or premises and he had not yet arrived there, or if it ends when he has left a certain place or premises, and he had left that place,[80] an injury from one who at other times might be his fellow-servant would not then ordinarily come within the rule.[81]

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[79] See Baltimore, etc., R. Co. v. Baugh, *supra;* New England R. Co. v. Conroy, *supra;* Schroeder v. Railroad Co. (1894), 103 Mich. 213, 61 N. W. 663, 50 Am. St. R. 354, 29 L. R. A. 321; Pasco v. Steel Co. (1908), 105 Minn. 132, 117 N. W. 479, 18 L. R. A. (N. S.) 153.

[80] See Northwestern Union Packet Co. v. McCue (1873), 84 U. S. (17 Wall.) 508, 21 L. Ed. 705, Wambaugh's Cas. 805 (Held, competent for jury to find that a man employed on shore to carry goods onto a boat, and who was paid off on the boat, ended his services on the boat, so as not to be in the service in going ashore the last time).

See also Baird v. Pettit (1872), 70 Pa. 477, (where the court said: "As soon as he left the building he was his own master. He was then no more in the defendant's service than any other citizen passing along the street, and he was entitled to the same rights and immunities"); Baltimore, etc., R. Co. v. State (1870), 33

Md. 542 (going home from work); Cincinnati, etc., R. Co. v. Conley (1892), 14 Ky. L. Repr. 568, 20 S. W. 816 (not working on the day of the injury); Savannah, etc., R. Co. Flannagan (1889), 82 Ga. 579, 9 S. E. 471, 14 Am. St. R. 183.

But otherwise if he were on the premises for purposes of the service though not at work at the moment, as where he was going to the place of starting work: Olsen v. Andrews (1897), 168 Mass. 261, 47 N. E. 90; Ewald v. Railway Co. (1888), 70 Wis. 420, 36 N. W. 12, 5 Am. St. R. 178; Boldt v. Railroad Co. (1858), 18 N. Y. 432; or going to another place on the premises to eat his lunch: Boyle v. Columbian Co. (1902), 182 Mass. 93, 64 N. E. 726; or to change his clothes before leaving for the day: Willmark v. Cardoza (1910), 99 C. C. A. 475, 176 Fed. 1, 27 L. R. A. (N. S.) 376; or waiting a call to work: St. Louis, etc., R. Co. v. Welch (1888), 72 Tex. 298, 10 S. W. 529, 2 L. R. A. 839.

Same question under Workmen's Compensation Acts: cannot recover for injuries while on his way to work but before he reached the premises: De Constantin v. Public Service Com. (1914), 75 W. Va. 32, 83 S. E. 88, L. R. A. 1916A, 329; Ocean Acc. Co. v. Industrial Acc. Com. (1916), 173 Cal. 313, 159 Pac. 1041, L. R. A. 1917B, 336 (coming or going); Fumiciello's Case (1914), 219 Mass. 488, 107 N. E. 349.

Compare Starr Piano Co. v. Industrial Acc. Com. (1919), 181 Cal. 433, 184 Pac. 860.

[81] An employee who has gone to the place where he enters the service and rides from there to the spot where the work for the day is to be done, upon his employer's gravel-train, hand-car, elevator, etc., or who returns in the same way, is in the service while so riding, and the fellow-servant rule applies: Gillshannon v. Railroad Co. (1852), 10 Cush. (Mass.) 228, Wambaugh's Cas 794. So also, Tunney v. Railway Co. (1866), L. R. 1 C. P. 291; Coldrick v. Partridge [1910], App. Cas. 77; Vick v. Railroad Co. (1884), 95 N. Y. 267, 47 Am. Rep. 36. See also Indianapolis Transit Co. v. Foreman (1903), 162 Ind. 85, 69 N. E. 669; Shannon v. Railroad Co. (1906), 27 R. I. 475, 63 Atl. 488 (here he rode on an "employee's ticket"); Martin v. Railroad Co. (1896), 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051; Abend v. Railroad Co. (1884), 111 Ill. 202, 53 Am. Rep. 616. So held, also, where a laundress was being taken home in her employer's wagon in pursuance of an arrangement to that effect: McGuirck v. Shattuck (1893), 160 Mass. 45, 35 N. E. 110, 39 Am. St. R. 454.

So while riding down on the elevator at the noon hour to the basement where he was to eat his lunch: Boyle v. Columbian

Whether, under the circumstances, the service had begun or ended, would, where different inferences might reasonably be drawn, be a question for the jury.[82]

§ 442. Contributory negligence of servant.—Notwithstanding the negligence of the master or of those for whom he is responsible, the servant's right of recovery may be defeated by his own contributory negligence. In general, the same rules which apply to contributory negligence in other cases operate here. The servant can not recover if his own negligence directly contributed to cause the injury.[83] It is not, at common

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Co. (1902), 182 Mass. 93, 64 N. E. 726. But compare Williams v. Signal Co. (1916), 37 S. Dak. 423, 158 N. W. 901.

But a street car employee who has finished his run for the day, left his car, and is riding home free on another car of the company in accordance with a regulation that employees may do so, is not in the service: Dickinson v. Railway Co. (1901), 177 Mass. 365, 59 N. E. 60, 83 Am. St. R. 284, 52 L. R. A. 326. Nor is he, where he rides on a ticket given to him as part of his compensation: Enos v. Railway Co. (1907), 28 R. I. 291, 67 Atl. 5, 12 L. R. A. (N. S.) 244, or where he is entitled to free transportation in addition to his wages. McNulty v. Railroad Co. (1897), 182 Pa. 479, 38 Atl. 524, 38 L. R. A. 376, 61 Am. St. R. 721.

See also Chattanooga Transit Co. v. Venable (1900), 105 Tenn. 460, 58 S. W. 861, 51 L. R. A. 886; Doyle v. Railroad Co. (1894), 162 Mass. 66, 37 N. E. 770, 44 Am. St. R. 335, 25 L. R. A. 157, 166 Mass. 492, 44 N. E. 611, 55 Am. St. R. 417, 33 L. R. A. 844; Abell v. Railroad Co. (1884), 63 Md. 433; Peterson v. Traction Co. (1900), 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L. R. A. 586; Baird v. Railroad Co. (1914), 78 Wash. 67, 138 Pac. 325; Moronen v. McDonnell (1913), 177 Mich. 691, 143 N. W. 8.

The risks assumed do not include loss of services by injury to servant's wife when riding as a passenger on the railroad which employed him: Gannon v. Railroad Co. (1873), 112 Mass. 234, 17 Am. Rep. 82, Wambaugh's Cas. 803. But suppose it were part of his contract that he would contribute her services as well as his own, and she were riding for that purpose?

[82] See Packet Co. v. McCue, (1873), 84 U. S. (17 Wall.) 508, 21 L. Ed. 705, Wambaugh's Cas. 805, *supra*.

[83] See Warden v. Railroad Co. (1891), 94 Ala. 277, 10 So. 276, 14 L. R. A. 552; St. Louis Ry. Co. v. Dupree (1907), 84 Ark. 377, 105 S. W. 878, 120 Am. St. R. 74; Victor Coal Co. v. Muir (1894),

law, a matter of comparative negligence or of attempting to apportion damages according to the degrees of negligence. Statutes, however, sometimes provide for such an apportionment.

The law, nevertheless, attributes such influence to the directions of the master, and to the natural inference that he will not direct an act to be done unless it can be done with reasonable safety, that where the act, which is charged to the servant as contributory negligence, was one which he undertook by the express command of the master or his agent, his doing it will not be deemed to be negligent unless the danger was so inevitable or so obviously imminent that a man of ordinary prudence would not, under the circumstances, have undertaken it.[84]

So the fact that the servant was young or inexperienced may

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20 Colo. 320, 38 Pac. 378, 46 Am. St. R. 299, 26 L. R. A. 435; Novelty Theater Co. v. Whitcomb (1909), 47 Colo. 110, 106 Pac. 1012, 37 L. R. A. (N. S.) 514; New York, etc., R. Co. v. Hamlin (1907), 170 Ind. 20, 79 N. E. 1040, 15 Ann. Cas. 988, 10 L. R. A. (N. S.) 881; Wormell v. Railroad Co. (1887), 79 Me. 397, 10 Atl. 49, 1 Am. St. R. 321; Vicksburg R. Co. v. Wilkins (1872), 47 Miss. 404; O'Hare v. Mfg. Co. (1901), 71 N. H. 104, 51 Atl. 257, 93 Am. St. R. 499; Johnston v. Lighting Co. (1908), 193 N. Y. 592, 86 N. E. 539, 127 Am. St. R. 988; Bennett v. Railroad Co. (1891), 2 N. Dak. 112, 49 N. W. 408, 13 L. R. A. 465; Houston, etc., R. Co. v. DeWalt (1902), 96 Tex. 121, 70 S. W. 531, 97 Am. St. R. 877; Darracott v. Railroad Co. (1887), 83 Va. 288, 2 S. E. 511, 5 Am. St. R. 266; Stratton v. Lumber Co. (1905), 39 Wash. 323, 81 Pac. 831, 109 Am. St. R. 881.

See, as to disobedience of express rules prescribed by the master to insure safety, as constituting contributory negligence, Smith v. Mining Co. (1904), 27 Utah 307, 75 Pac. 749.

[84] See Southern Ry. Co. v. Shields (1898), 121 Ala. 460, 25 So. 811, 77 Am. St. R. 66; Choctaw, etc., R. Co. v. Jones (1906), 77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 837, 7 Ann. Cas. 430; Fox v. Railway Co. (1892), 86 Iowa 368, 53 N. W. 259, 17 L. R. A. 289; St. Louis, etc., R. Co. v. Morris (1907), 76 Kan. 836, 93 Pac. 153, 13 L. R. A. (N. S.) 1100; Noble v. Lumber Co. (1909), 151 N. Car. 76, 65 S. E. 622, 134 Am. St. R. 974; Schiglizzo v. Dunn (1905), 211 Pa. 253, 60 Atl. 724, 107 Am. St. R. 567; Tuckett v. Laundry Co. (1906), 30 Utah 273, 84 Pac. 500, 116 Am. St. R. 832, 4 L. R. A. (N. S.) 990.

also be taken into account, since he may have had neither the judgment to realize the danger, nor the strength of will to resist an unwarranted command.[85]

§ 443. **Assumption of risk by servant.**—A servant injured by the negligence of the master may sometimes lose his right to recover because he is held to have assumed the risk. The term "assumption of risk" is often used in two senses. The first is that already referred to, namely, the servant by the mere acceptance of the service is usually deemed to have assumed the ordinary, inherent risks which are attendant upon such an enterprise even when conducted with the standard degree of care. These are not attributable to the fault or negligence of the master, but are naturally inherent in the enterprise.

But if after the servant has entered upon the service he finds that, owing to defects in place or equipment, the retaining of incompetent servants, and the like, due to the negligent manner in which the master conducts the business, these ordinary and inherent risks are increased or aggravated, a different situation is presented. The servant may lawfully quit the service. Even if he had agreed to remain for a definite time, this unexpected breach by the master of the implied condition upon which the service was accepted would justify the servant in repudiating his agreement.[86] If, however, instead of quitting as he might, the servant stays on, in face of obvious dangers, without making any new arrangement, he is ordinarily held, by so remaining, to have assumed the risk of the enhanced danger, and if he is later injured by it, he may not recover.[87] *Volenti*

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[85] See Foley v. Horseshoe Co. (1896), 115 Cal. 184, 47 Pac. 42, 56 Am. St. R. 87; Dougherty v. Dobson (1906), 214 Pa. 252, 63 Atl. 748, 8 L. R. A. (N. S.) 90.

[86] If he were, in fact, physically constrained, the result would be different: See Eldridge v. Steamship Co. (1892), 134 N. Y. 187, 32 N. E. 66, Wambaugh's Cas. 868, where there was evidence that if a seaman had refused to obey an order he would have been put in irons and fined.

[87] See Birmingham, etc., R. Co. v. Allen (1892), 99 Ala. 359, 13 So. 8, 20 L. R. A. 457; Choctaw R. Co. v. Jones (1906), 77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 837, 7 Ann. Cas. 430; Limberg v. Lumber Co. (1900), 127 Cal. 598, 60 Pac. 176, 49 L. R. A. 33;

non fit injuria has often been said to be a maxim applicable here.[88]

§ 443a. —— Where master promises to repair defect.—If however, instead of merely staying on, without protest or any new arrangement, the servant complains to the master or his authorized representative, and secures from him a promise that the defect will be remedied or the danger removed, and stays on in reliance upon such promise, where the danger is not so imminent that no reasonable man would run the risk, he does not assume the risk as long as the promise is operative.[89]

Ill. Cent. R. Co. v. Fitzpatrick (1907), 227 Ill. 478, 51 N. E. 529, 118 Am. St. R. 280; Martin v. Railroad Co. (1902), 118 Iowa 148, 91 N. W. 1034, 96 Am St. R. 371, 59 L. R. A. 698; Lamson v. Axe Co. (1900), 177 Mass. 144, 58 N. E. 585, 83 Am. St. R. 267; Lynch v. Traction Co. (1908), 153 Mich. 174, 116 N. W. 983, 21 L. R. A. (N. S.) 774; Reberk v. Horne (1902), 85 Minn. 326, 88 N. W. 1003; Chicago, etc., R. Co. v. Curtis (1897), 51 Neb. 442, 71 N. W. 42, 66 Am. St. R. 456; Sanderson v. Lumber Co. (1901), 50 W. Va. 42, 40 S. E. 368, 88 Am. St. R. 841, 55 L. R. A. 908.

Contra: Jewell v. Bolt Co. (1910), 231 Mo. 176, 132 S. W. 703, 140 Am. St. R. 515; Russ v. Harper (1911), 156 N. Car. 444, 72 S. E. 570; Richmond, etc., R. Co. v. Norment (1887), 84 Va. 167, 4 S. E. 211, 10 Am. St. R. 827.

[88] Compare, Lord Bramwell, in Memberry v. Railway Co. (1889), 14 App. Cas. 179, 187.

[89] See Clarke v. Holmes (1862), 7 H. & N. 937, Wambaugh's Cas. 836; Eureka Co. v. Bass (1886), 81 Ala. 200, 8 So. 216, 60 Am. Rep. 152; Cheeney v. Steamship Co. (1893), 92 Ga. 726), 19 S. E. 33, 44 Am. St. R. 113; Morden Works v. Fries (1907), 228 Ill. 246, 81 N. E. 862, 119 Am. St. R. 428; Buehner v. Mfg. Co. (1904), 124 Iowa 445, 100 N. W. 345, 104 Am. St. R. 354; Southern, etc., Ry. Co. v. Croker (1889), 41 Kan. 747, 21 Pac. 785, 13 Am. St. R. 320; Breckenridge v. Hicks (1893), 94 Ky. 362, 15 Ky. L. Rep. 143, 22 S. W. 554, 42 Am. St. R. 361; Dempsey v. Sawyer (1901), 95 Me. 295, 45 Atl. 1035; Roux v. Lumber Co. (1891), 85 Mich. 519, 48 N. W. 1092, 24 Am. St. R. 102, 13 L. R. A. 728; Rice v. Paper Co. (1903), 174 N. Y. 385, 66 N. E. 979, 95 Am. St. R. 585, 62 L. R. A. 611; Union Mfg. Co. v. Morrissey (1883). 40 Ohio St. 148, 48 Am. Rep. 669; Brownfield v. Hughes (1889), 128 Pa. 194, 18 Atl. 340, 15 Am. St. R. 667; Gulf, etc., R. Co. v. Donnelly (1888), 70 Tex. 371, 8 S. W. 52, 8 Am. St. R. 608; Yerkes v. Railway Co. (1901), 112 Wis. 184, 88 N. W. 33, 88 Am. St. R. 961.

If, indeed, after a fair time for performance, it becomes apparent that the master does not intend to perform his promise to repair or remove the difficulty, and yet the servant still stays on without exacting a fresh assurance, he will, in accordance with this theory, be deemed to have henceforth assumed the risk.[90]

§ 443b. —— **Knowledge of defect and of risk necessary.**— In order to bring a case within the operation of this rule, the servant must actually have known of the situation or it must have been so open and obvious that an ordinarily prudent person exercising reasonable care for his own safety could not be ignorant of it. And not only must the *defect* be known or obvious, but so also must be the *risk*.[91]

Where, therefore, the servant was young or inexperienced or ignorant, the inference of assumption of risk is reluctantly drawn and it becomes usually a question for the jury whether, under all the circumstances, there was an intelligent appreciation of the risk and a voluntary assumption of it.[92]

Held, not to apply where the danger complained of is the possibility of injury by the unexpected negligence of a fellow servant: Vogt v. Honstain (1900), 81 Minn. 174, 83 N. W. 533.

[90] See Eureka Co. v. Bass, *supra;* Union Mfg. Co. v. Morrissey, *supra;* Illinois Steel Co. v. Mann (1897), 170 Ill. 200, 48 N. E. 417, 62 Am. St. R. 370, 40 L. R. A. 781; Albrecht v. Railroad Co. (1901), 108 Wis. 530, 84 N. W. 882, 53 L. R. A. 653; Crutchfield v. Railroad Co. (1877), 78 N. Car. 300.

[91] See Texas, etc., Ry. Co. v. Swearingen (1904), 196 U. S. 51, 25 Sup. Ct. 164, 49 L. Ed. 382; Choctaw Ry. Co. v. McDade (1903), 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; St. Louis, etc., Ry. Co. v. Birch (1909), 89 Ark. 424, 117 S. W. 243, 28 L. R. A. (N. S.) 1250; Rase v. Railway Co. (1909), 107 Minn. 260, 120 N. W. 360, 21 L. R. A. (N. S.) 138; McDuffee v. Railroad Co. (1908), 81 Vt. 52, 69 Atl. 124, 130 Am. St. R. 1019.

[92] See Bare v. Coal Co. (1906), 61 W. Va. 28, 55 S. E. 607, 123 Am. St. R. 966, 8 L. R. A. (N. S.) 284; Lane v. Manchester Mills (1908), 75 N. H. 102, 71 Atl. 629; Dallemand v. Saalfeldt (1898), 175 Ill. 310, 51 N. E. 645, 67 Am. St. R. 214, 48 L. R. A. 753; Di Bari v. Bishop (1908), 199 Mass. 254, 85 N. E. 89, 127 Am. St. R. 497, 17 L. R. A. (N. S.) 773.

§ 444. —— Effect of economic pressure—Of master's command.—The fact that the servant stays on because of fear of losing his job is ordinarily held not to affect the case.[93] Neither, ordinarily, does the fact that he is expressly commanded by the master to do the act; he did not have to stay or he did not have to obey the command.[94] But however sound that may be where there has been time for observation and consideration, it is recognized that when the whole question of defect or risk arises suddenly, perhaps in an emergency, and there is a command or occasion to act under such circumstances that there may not be time or opportunity to consider, or the servant's attention may be so absorbed in the act that he cannot consider the circumstances, it becomes a question of fact whether there was an assumption of the risk, which must be left to the jury to decide rather than to be disposed of as an inference of law.[95]

§ 445. —— Dissents from general doctrine.—A few courts in this country do not accept this doctrine of assumption of risks by remaining in the employment,[96] and the English courts have attached more importance to the actual voluntariness of the case than most of the American courts have done.[97]

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[93] See Wescott v. Railroad Co. (1891), 153 Mass. 460, 27 N. E. 10; Lamson v. Axe Co. (1900), 177 Mass. 144, 58 N. E. 585, 83 Am. St. R. 267; Burke v. Davis (1906), 191 Mass. 20, 76 N. E. 1039, 114 Am. St. R. 591, 4 L. R. A. (N. S.) 971.

[94] See Briggs v. Coal Co. (1909), 163 Ala. 237, 50 So. 1025; Showalter v. Fairbanks (1894), 88 Wis. 376, 60 N. W. 257; Hencke v. Ellis (1901), 110 Wis. 532, 86 N. W. 171; Maltbie v. Belden (1901), 167 N. Y. 307, 60 N. E. 645, 54 L. R. A. 52; Bier v. Hosford (1904), 35 Wash. 544, 77 Pac. 867; Hanson v. Hammell (1899), 107 Iowa 171, 77 N. W. 839.

[95] See Perrier v. Worsted Mills (1909), 29 R. I. 396, 71 Atl. 796.

[96] See Richmond, etc., R. Co. v. Norment (1887), 84 Va. 167, 4 S. E. 211, 10 Am. St. R. 827.

An express contract in advance to assume risks of master's negligence not enforceable: Johnston v. Fargo (1906), 184 N. Y. 379, 77 N. E. 388, 7 L. R. A. (N. S.) 537, 6 Ann. Cas. 1.

[97] See for example, the changed forms of expression in such cases as Smith v. Baker [1891], App. Cas. 325; Williams v. Birmingham Battery Co. [1899], 2 Q. B. 338. Compare 15 Law Quar. Rev. 336.

§ 446. —— Assumption of risks existing in violation of statutes.—The question of the assumption of risks where the defect or risk was one resulting from the non-performance of some statutory duty designed to promote safety, instead of the non-performance of what may be termed the common-law duties of the master, has given rise to several distinctions. The statute may expressly provide that there shall be no assumption. If it does not, some courts hold that the imposition of the statutory duty creates a public policy which forbids assumption.[98] Other courts hold that there is no distinction in this respect between statutory and non-statutory duties.[99]

§ 447. —— Assumption of risks distinguishable from contributory negligence.—Assumption of risks is distinguishable from contributory negligence, though at the times they run very near together. Even though the servant may not have assumed the risks, he must still exercise reasonable care for his own safety, and if his own negligence contributed to his injury he could not recover.[1]

§ 448. Statutory changes—Employer's Liability Acts—

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[98] See Narramore v. Railway Co. (1899), 37 C. C. A. 499, 96 Fed. 298, 48 L. R. A. 68; Johnson v. Coal Co. (1908), 88 Ark. 243, 114 S. W. 722, 123 S. W. 1180, 19 L. R. A. (N. S.) 646; Streeter v. Scraper Co. (1912), 254 Ill. 244, 98 N. E. 541, Ann. Cas. 1913C, 204, 41 L. R. A. (N. S.) 628.

[99] See St. Louis Cordage Co. v. Miller (1903), 61 C. C. A. 477, 126 Fed. 495, 63 L. R. A. 551; Denver, etc., R. Co. v. Norgate (1905), 72 C. C. A. 365, 141 Fed. 247, 6 L. R. A. (N. S.) 981 (Certiorari denied 202 U. S. 616, 26 Sup. Ct. 764, 50 L. Ed. 1172); Birmingham, etc., Electric Co. v. Allen (1892), 99 Ala. 359, 13 So. 8, 20 L. R. A. 457; Denver, etc., R. Co. v. Gannon (1907), 40 Colo. 195, 90 Pac. 853, 11 L. R. A. (N. S.) 216.

[1] See Rase v. Railway Co. (1909), 107 Minn. 260, 120 N. W. 360, 21 L. R. A. (N. S.) 138; St. Louis Cordage Co. v. Miller, *supra;* Johnson v. Coal Co. (1908), 88 Ark. 243, 114 S. W. 722, 19 L. R. A. (N. S.) 646; Choctaw, etc., R. Co. v. McDade (1903), 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; Schlemmer v. Railroad Co. (1906), 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681; Solt v. Radiator Co. (1911), 231 Pa. 585, 80 Atl. 1119; Bradburn v. Railroad Co. (1903), 134 Mich. 575, 96 N. W. 929.

Workmen's Compensation Acts.—The English and American rules governing the master's liability either to third persons or to his servants have had no precise counterpart in the countries of Continental Europe. For a good many years, some of them have had quite elaborate statutory provisions looking to the relief of workmen injured in industry. England adopted an employers' liability act in 1880, which has since been considerably extended, and which was designed to make the master liable in many cases in which he would not be liable under common-law rules.[2] In the United States, there was at first a number of changes by statute of the common law rules, especially those of fellow-servant, contributory negligence and assumption of risk, with regard to railroads. In 1908 Congress passed the so-called second Employers' Liability Act affecting all common carriers by railroad engaged in interstate commerce.[3]

§ 449. —— Beginning about 1910, very sweeping changes were inaugurated in the various States, at first taking the form of extending the master's liability by removing some or all of the most common defenses, but later proceeding upon a new theory namely, that the consumers of the products of an industry should be made to bear the cost of the injuries arising in its prosecution. This was to be done by providing a definite basis of compensation which the master should be required to pay in the first instance, but which he was expected and often required to insure himself against, and then, by adding the cost of the insurance to the price of his product, was expected to pass it on to the ultimate consumer, who, it was assumed, ought finally to bear it.

Notwithstanding much strenuous opposition,[4] the constitutional power of the State to make these changes was generally upheld,[5] and there now exist in most of the States provisions for compensating injured workmen or their dependents for injuries received in industry without regard to fault, unless wilful, and completely abolishing in the industries affected the old doctrines of contributory negligence, assumption of risk and the fellow-servant rule. In a number of States special boards or commissions have been set up for the purpose of applying and enforcing these laws; and special rules respecting procedure and evidence are established. The matter of the employer's insurance is also often regulated. The compensation is sometimes to be paid in one sum; sometimes in installments. Subjection to the law has sometimes been made elective, sometimes compulsory.

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[2] See 43 & 44 Victoria, c. 42; 60 & 61 Vict. c. 37; 63 & 64 Vict. c. 22, c. 37; 6 Edw. VII, c. 58.

[3] See Second Employers' Liability Cases (1911), 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; Philadelphia, etc., R. Co. v. Schubert (1911), 224 U. S. 603, 32 Sup. Ct. 593, 56 L. Ed. 894; Ward v. Krinsky (1922), 259 U. S. 503.

[4] The New York statute of 1910 was held unconstitutional in Ives v. Railway Co. (1911), 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156.

§ 450. —— The acts sometimes apply to enumerated occupations; sometimes to those deemed or declared to be hazardous or extra-hazardous; sometimes only to those in which more than a small minimum number of persons are employed; and the like.

Domestic servants, farm laborers and casual employees are commonly excluded from the acts and therefore remain under common law rules.

The injuries for which compensation is to be paid are usually defined as those "arising out of and in the course of the employment,"—a phrase which has been found to be frequently of very difficult application.[6]

Constitution later amended to permit it: Jensen v. Railway Co. (1915), 215 N. Y. 514, 109 N. E. 600; New York Cent. R. Co. v. White (1917), 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667.

[5] See Borgnis v. Falk (1911), 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489; Opinion of Justices (1911), 209 Mass. 607, 96 N. E. 308, Ann. Cas. 1913B, 815; State v. Clausen (1911), 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466; State v. Creamer (1912), 85 Ohio St. 349, 97 N. E. 602, 39 L. R. A. (N. S.), 694; Arizona Employers Liability Cases (1919), 250 U. S. 400, 39 Sup. Ct. 553, 63 L. Ed. 1058: Thornton v. Duffy (1920), 254 U. S. 361, 41 Sup. Ct. 137, 65 L. Ed. 304.

[6] See, for example, "A Chapter of Accidents," 39 Law Quarterly

As a rule these statutes protect employees only, and not third persons.[7]

4. *Right to a Lien.*

§ 451. **When agent has a lien.**—As will be seen in the last chapter, special kinds of agents like the attorney at law, the auctioneer, the factor, and the like, are frequently given a right of lien upon their principal's property in their possession to secure their compensation or reimbursement. Other agents also may at times have a lien.

Thus an agent to whom the principal has delivered property or securities for the purpose of having the agent do work or expend money upon them for the principal's benefit, may have a lien upon such property, if still in his possession, to secure his compensation or reimbursement.[8] An agent who by his expenditures or labor has produced something for his principal, which is still in the agent's possession, may have a lien upon it for the same purpose.[9] And an agent who, at his principal's request, has advanced money or pledged his credit to or for his principal, in reliance express or fairly implied upon the security of the principal's goods or property in the agent's possession, has a lien upon such property for his reimbursement or indemnity.[10]

Review, 60, commenting on the English Acts. This writer declares that the case-law is in a state of "inextricable muddle."

[7] See Saylor v. Electric Co. (1923), — Oreg. —, 212 Pac. 477.

[8] See Richards v. Gaskill (1888), 39 Kan. 428, 18 Pac. 494; Peterson v. Hall (1895), 61 Minn. 268, 63 N. W. 733.

[9] See Vinton v. Baldwin (1884), 95 Ind. 433 (one employed for a commission or fees to secure a loan for his principal and who has obtained it, may retain the money until his fees are paid); Muller v. Pondir (1873), 55 N. Y. 325, 14 Am. Rep. 259; Underhill v. Jordan (1902), 72 N. Y. App. Div. 71, 76 N. Y. Supp. 266, Goddard's Cas. 648; Hope v. Glendinning [1911], App. Cas. 419, (one who at request of principal buys goods or securities for him by advancing his own money is entitled to a lien upon those goods or securities for reimbursement). McKenzie v. Nevius (1843), 22 Me. 138, 38 Am. Dec. 291 (same as to agent who has obtained insurance policies for his principal by advancing his own money).

[10] See Nagle v. McFeeters (1884), 97 N. Y. 196 (where prin-

§ 452. —— This lien is usually a mere right of retainer, not of sale,[11] and depends upon continuing possession. It is also usually a particular lien and not a general one, that is, it applies to the particular service or expenditure and not to other services or expenditures or the general balance of account; and it is confined to the particular thing upon which or in reference to which the service was rendered, and does not extend to other property which may happen to be in the agent's possession.[12]

§ 453. **Right of agent to stop goods in transitu.**—An unpaid agent who has bought goods, at the request of the principal, but in the agent's name and upon the agent's credit, and has shipped them to his principal, may, if the principal becomes or is found insolvent during the transit, stop the goods in transit in substantially the same manner and for substantially the same reasons that an unpaid seller may exercise that right.[13]

§ 454. **Right of agent to retain title as security.**—An agent, also, who has bought goods for a principal in the agent's name and upon his credit or payment, and who is shipping them to his principal, may take the bill of lading in the agent's name or to the agent's order and thus retain a property in the goods to secure his payment and reimbursement.[14]

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cipal sends goods to an agent for sale and draws upon him for the anticipated proceeds, there is said to be a necessary inference that the goods were to be a security for the advances); Holbrook v. Wight (1840), 24 Wend. (N. Y.) 169, 35 Am. Dec. 607.

[11] In the absence of a statute or a conferred authority to sell, there is no authority to sell for the foreclosure of the lien; though the lien holder may often get judgment for the amount due him and then cause an execution to be levied upon the property, under which execution a sale could be made.

[12] See McKenzie v. Nevius (1843), 22 Me. 138, 38 Am. Dec. 291; Carpenter v. Momsen (1896), 92 Wis. 449, 65 N. W. 1027, 66 N. W. 692.

[13] See Newhall v. Vargas (1836), 13 Me. 93, 29 Am. Dec. 489; Seymour v. Newton (1870), 105 Mass. 272.

[14] See Farmers' Bank v. Logan (1878), 74 N. Y. 568; Moors v. Kidder (1887), 106 N. Y. 32, 12 N. E. 818.

CHAPTER XV.

OF THE DUTIES AND LIABILITIES OF THE PRINCIPAL TO THIRD PERSONS.

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§ 455. In general.—This subdivision of the general subject is naturally one of the most important ones. It certainly is the one most frequently arising. The reason for this is obvious. The very purpose of the creation of the agency is to enable the principal to put the agent forward to act, contract, speak, deal and be dealt with, in the place and stead of the principal in person. The question, therefore, of the liability which the principal incurs while thus acting through the intervention of his agent must constantly and necessarily present itself.

§ 456. What questions arise.—This question of the liability of the principal to third persons presents four chief aspects—

1. His liability upon contracts made by the agent.
2. His responsibility for the agent's declarations, admissions or representations.
3. His responsibility for matters brought to his agent's knowledge.
4. His liability for his own defaults.
5. His liability for his agent's torts and crimes.

I. Liability for Agent's Contracts.

§ 457. In general.—The question of the liability of the principal for the contracts of his agent may arise (1) where the principal at the time of making the contract was disclosed and known to exist, or (2) where the principal at the time was undisclosed; and separate consideration must be given to each aspect.

It is only with respect of contracts that the distinction between the disclosed and the undisclosed principal becomes material.

1. *The Contractual Liability of the Disclosed Principal.*

§ 458. Principal liable when.—It is not the purpose here to inquire concerning the *existence* of the authority. The question of how authority may be conferred and upon whom, has already been discussed.[1] Assuming that the relation of principal and agent exists, the question becomes, What contracts of the agent are binding upon the principal? To this question the general answer is: A principal is liable to third persons for all the lawful contracts of his agent, made for the principal and in his behalf, while the agent was acting within the scope of his authority and in the course of his undertaking; or which have subsequently been ratified by the principal with full knowledge of the facts.

Stated negatively, the principal is, in general, not liable upon contracts made by the agent not within the scope of the authority and not subsequently ratified.

§ 459. —— By the term "scope of the authority," as here used, is meant the aggregate or extent of the authority which, in accordance with any rule or presumption of law, is deemed to be expressly or impliedly conferred upon the agent. It includes not only that actually given but that "apparently" conferred. It embraces that which custom may confer. It includes, also, in a given case, that authority whose existence, as against the party interested, the principal is estopped to deny. Liability in any given case may embrace, finally, all those acts which, though not originally authorized, have been subsequently ratified with a full knowledge of the facts.[2]

By the term "principal" as here used, is meant not only an actual principal, but also any one who, within rules already referred to, can, in a given case, be estopped to deny that he was such,—the so-called *ostensible* or *apparent* principal.[3]

§ 460. **What contracts binding upon principal—Authorized contracts made in his name.**—In attempting a brief statement of what contracts may bind the principal under this rule, first place must be given to those which, being within the authority

[1] See *ante* Chap. V.

[2] See *ante* Chap. VI.

[3] See *ante* §§ 25, 105.

conferred, are clearly and distinctly made in the name and as the act of a disclosed principal. These bind the principal upon the simplest rules of agency. They may, of course, be written or unwritten, though naturally the express contract reduced to writing is likely to be the most unambiguous of all.

§ 461. —— **Informal contracts not expressly charging agent's responsibility.**—But the formal and express contracts are not the only ones upon which the principal is liable. As has been seen, where the agent is dealing orally and face to face with third persons, who know he is acting as agent for a disclosed principal, there is a presumption that he intends to bind his principal and not himself.[4] Hence though he uses informal phrases, or says colloquially "I" will pay or buy or sell, etc., the "I" will usually be deemed to mean his principal and not the agent personally. It is, of course, true, as has been seen, that even a known agent for a disclosed principal *may* pledge his own responsibility, instead of that of his principal, and where he has done so, he and not the principal will be liable.[5] Whether he has done so or not, is, as has been seen, usually a question of fact.[6] Informal entries or charges in such a case are also, as has been seen, not absolutely determinative. Thus the fact that an entry or charge was made upon one party's books or accounts against the principal or the agent would be significant but not conclusive in deciding upon whose credit the transaction actually was based.

The agent also, as has been seen, *may* add his responsibility to that of his principal either as a joint maker or as a surety, in which case they might both be liable.

§ 462. —— **Written contract made in agent's name.**—Where a written contract is made in the agent's name, the agent, as has been seen, may usually be held upon it, and he cannot escape by showing that it was made for a principal.[7]

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[4] See *ante* § 377.

[5] See *ante* §§ 371, 372.

[6] See *ante* § 375.

[7] See Jones v. Littledale (1837), 6 Ad. & El. 486, Wambaugh's Cas. 552; Higgins v. Senior (1841), 8 Mees. & Wels. 834, Mechem's Cas. 456, Goddard's Cas. 464, Wambaugh's Cas. 554.

But in such a case, if the contract be not a negotiable instrument or an instrument under seal, the other party, upon showing that it was really made for and by the authority of the principal, may, if he chooses, hold the principal; and if it is necessary to satisfy the statute of frauds he may, in his action against the principal, use the written contract signed by the agent, if it would satisfy the statute in an action against the agent,[8] as a note or memorandum of the contract signed, not by the principal in person, but "by his agent thereunto lawfully authorized."[9]

As to the question of election between the principal's credit and that of the agent only, in such a case, while there is some authority to the effect that taking the agent's contract in writing conclusively shows an election,[10] the weight of authority is doubtless to the effect that while it is strong evidence it is not conclusive.[11]

For technical reasons, the principal could not generally be held upon a deed or a negotiable instrument made in the agent's name alone.

2. *The Contractual Liability of the Undisclosed Principal.*

§ 463. In general.—What has thus far been said in this subdivision has had to do with the liability of the principal who was known to be such at the time of the transaction; but, as has been already intimated, it is not always the fact that the existence and name of the principal are thus known. The principal, for some reason, may prefer to keep in the background, or the agent, without the knowledge or authority of the principal, may fail to disclose that he is an agent and deal as though he were himself the real party in interest. What then is the liability of such a principal?

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[8] Compare Mertz v. Hubbard (1907), 75 Kan. 1, 88 Pac. 529, 121 Am. St. R. 352, 8 L. R. A. (N. S.) 733, 12 A. & E. Ann. Cas. 485; Walker v. Hafer (1909), 95 C. C. A. 311, 170 Fed. 37, 24 L. R. A. (N. S.) 315; Langstroth v. Lumber Co. (1914), 162 N. Y. App. Div. 818, 148 N. Y. Supp. 224, aff'd 220 N. Y. 706.

[9] See Calder v. Dobell (1871), L. R. 6 C. P. 486, Wambaugh's Cas. 564; Higgins v. Senior, *supra*. *Contra:* Fenley v. Stewart (1851), 5 Sandf. (7 N. Y. Super.) 101.

[10] See Chandler v. Coe (1874), 54 N. H. 561, Wambaugh's Cas. 573; Ferguson v. McBean (1891), 91 Cal. 63, 27 Pac. 518, 14 L. R. A. 65; Heffron v. Pollard (1889), 73 Tex. 96, 11 S. W. 165, 15 Am. St. R. 764.

[11] See Calder v. Dobell, *supra;* Byington v. Simpson (1883), 134 Mass. 169, 45 Am. Rep. 314, Mechem's Cas. 558, Wambaugh's Cas. 581.

It must be observed that, by the hypothesis, there is a competent principal in existence who has authorized, and is entitled to the benefits of the act of the agent; he has simply not been disclosed. The case, therefore, is radically unlike that presented in the domain of ratification where, by the hypothesis, there was, at the time of the act, no principal who had authorized it. This distinction is not infrequently lost sight of, and the two cases treated as substantially identical.

The principal in a given case may be undisclosed either because his existence was not known, or because, though his existence was known, his identity was concealed.

§ 464. **Theories respecting liability.**—It seems, at first blush, to be doing violence to all the theories respecting contractual liability to assert that one who did not appear or purport to be a party to a contract may be held liable upon it. It may also be said that to do so is either unnecessary or unjust, since the party who now seeks to do so showed, by the very act of making the contract with the agent as the supposed principal to it, that he was then satisfied to take his credit. Why now should he be entitled to look to some one of whose relation to the transaction he had no notice, and upon whose responsibility he did not rely? To permit him to do so is to present him with what an English judge termed a mere "God-send."

On the other hand, it is urged that it is just. The alleged principal by the hypothesis *was* the principal; the contract was in fact made on his account; he will get the benefit of it; why then should he not also take the responsibility?

It is also said that to hold the undisclosed principal directly saves circumlocution. If the other party holds the agent, the latter will seek reimbursement from the principal. If the latter is to be held ultimately any way, why not save time and trouble by proceeding directly against him in the first instance? If his substantial rights are safeguarded, it can do him no harm.[12]

This view has, in general, in English and American law (though not usually upon the Continent) found favor, with the effect shown in the following section.

§ 465. Real principal liable when discovered.—It is the general rule that the real principal in the transaction, though undisclosed at the time of making the contract, may at the election of the other party if exercised within a reasonable time, be held liable, when discovered, upon all simple contracts made in his behalf by his agent, even though at the time of making the contract the party dealing with the agent did not know that he was an agent or did not know who his principal was, and gave credit to the agent supposing him to be the principal.[13]

Parol evidence may be resorted to in order to identify the principal, even when the contract is in writing.[14] To do so, does not, it is held, *contradict* the writing; it merely adds another party's liability upon the contract; neither does it *release* the agent: his liability still continues.

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[12] See Article by Dean James Barr Ames, in 18 Yale Law Journal 443, suggesting that an equitable remedy is preferable; also Article by Dean William Draper Lewis, in 9 Columbia Law Review, 116.

[13] See Thompson v. Davenport (1829), 9 Barn. & Cress. 78, Mechem's Cas. 547, Goddard's Cas. 748, Wambaugh's Cas. 637; Darrow v. Produce Co. (1893), 57 Fed. 463, Goddard's Cas. 741; Mississippi Valley Co. v. Abeles (1908), 87 Ark. 374, 112 S. W. 894; Curran v. Holland (1903), 141 Cal. 437, 75 Pac. 46; Steele-Smith Grocery Co. v. Potthast (1899), 109 Iowa 413, 80 N. W. 517; Edwards v. Gildemeister (1899), 61 Kan. 141, 59 Pac. 259; Maxcy Mfg. Co. v. Burnham (1897), 89 Me. 538, 36 Atl. 1003, 56 Am. St. R. 436; Schweyer v. Jones (1908), 152 Mich. 241, 115 N. W. 974; City Trust Co. v. Brewing Co. (1903), 174 N. Y. 486, 67 N. E. 62; Harper v. Bank (1896), 54 Ohio St. 425, 44 N. E. 97; Waddill v. Sebree (1892), 88 Va. 1012, 14 S. E. 849, 29 Am. St. R. 766; Belt v. Water Power Co. (1901), 24 Wash. 387, 64 Pac. 525.

Fact that other party said at the time that he would not make the contract if a certain person was the principal, which the agent denied, *held*, not to prevent his holding him later on discovering that he was the principal, Kayton v. Barnett (1889), 116 N. Y. 625, 23 N. E. 24, Mechem's Cas. 553, Wambaugh's Cas. 652. But see *post* § 597.

[14] See Higgins v. Senior, *supra;* Byington v. Simpson, *supra.*

The liability may be enforced by any form of appropriate action, *e. g.*, by a bill for specific performance as well as by an action for damages.[15]

The principal may make any defence which he has, or any, growing out of the contract, which the agent might make.

§ 466. To what contracts rule applies.—The rule applies to all simple contracts, whether written or unwritten, and to those required to be in writing as well as to those not so required,[16] to executory contracts as well as to executed ones; but it does not apply to negotiable instruments,[17] or to instruments under seal, at least where the common law attributes of a seal still survive.[18] Some courts have been disposed to disregard an unnecessary seal; others have not. In a number of States, the distinctions between sealed and unsealed instruments have been abolished by statute.[19]

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[15] See Waddill v. Sebree, *supra.*

[16] As to satisfying the statute of frauds, see Walker v. Hafer (1909), 95 C. C. A. 311, 170 Fed. 37, 24 L. R. A. (N. S.) 315, and Note as to the use of parol evidence: Mertz v. Hubbard (1907), 75 Kan. 1, 88 Pac. 529, 121 Am. St. R. 352, 8 L. R. A. (N. S.) 733, and Note, 12 A. & E. Ann. Cas. 485 (land cases); Langstroth v. Lumber Co. (1914), 162 N. Y. App. Div. 818, 148 N. Y. Supp. 224, aff'd 220 N. Y. 706 (chattel case); Grafton v. Cummings (1878), 99 U. S. 100, 25 L. Ed. 366; Walsh v. Barton (1873), 24 Ohio St. 28.

[17] See Sparks v. Transfer Co. (1891), 104 Mo. 531, 15 S. W. 417, 24 Am. St. R. 351, 12 L. R. A. 714; Webster v. Wray (1886), 19 Neb. 558, 27 N. W. 644, 56 Am. Rep. 754, Goddard's Cas. 753; Shuey v. Adair (1897), 18 Wash. 188, 51 Pac. 388, 63 Am. St. R. 879, 39 L. R. A. 473.

As between the original parties, however, an action may often be maintained against the principal, not upon the note or bill of exchange, but upon the contract out of which that originated. See Pentz v. Stanton (1833), 10 Wend. (N. Y.), 271, 25 Am. Dec. 558, Wambaugh's Cas. 643; Coaling Co. v. Howard (1908), 130 Ga. 807, 61 S. E. 987, 21 L. R. A. (N. S.) 1051.

Where the bill or note bears some reference to a principal and the action is between the original parties, or even by a subsequent holder if the reference is sufficient to make the paper ambiguous on its face, some courts have admitted parol evidence to charge the principal. See Burkhalter v. Perry (1906), 127 Ga. 438, 56 S. E. 631, 119 Am. St. R. 343.

See *ante* §§ 293-295.

[18] See Briggs v. Partridge (1876), 64 N. Y. 357, 21 Am. Rep. 617, Mechem's Cas. 436; Borcherling v. Katz (1883), 37 N. J. Eq.

A written contract whose terms exclude the existence of an undisclosed principal—one which must be expressly *contradicted* by the evidence of such a principal—has been held not open to such proof to permit the undisclosed principal to sue upon it, as will be seen in a later section.[20]

§ **467. Exceptions—1—Election.**—To the general rule thus giving the other party the right to hold the undisclosed principal when discovered, there are two chief exceptions:—

1. The principal can not be held where, although he was not disclosed at the time of the transaction, he has since been disclosed and the other party has then, with full knowledge as to the principal and with power of choice, deliberately elected to give credit to the agent alone.

§ **468.** —— Knowledge not only of the existence but of the name of the principal is ordinarily necessary to an intelligent election,[21] and what the other party may have done

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150, Wambaugh's Cas. 647; Van Dyke v. Van Dyke (1905), 123 Ga. 686, 51 S. E. 582, 3 Ann. Cas. 978, Goddard's Cas. 749; Mahoney v. McLean (1880), 26 Minn. 415, 4 N. W. 784.

[19] As to their effect upon the subject, see Efta v. Swanson (1911), 115 Minn. 373, 132 N. W. 335; Streeter v. Janu (1903), 90 Minn. 393, 96 N. W. 1128; Gibbs v. Dickson (1878), 33 Ark. 107; abolishes it.

Contra: Sanger v. Warren (1898), 91 Tex. 472, 44 S. W. 477, 66 Am. St. R. 913; Jones v. Morris (1878), 61 Ala. 518, 524.

[20] See Humble v. Hunter (1848), 12 Q. B. 310, Wambaugh's Cas. 629; *post* § 596. Compare Kayton v. Barnett (1889), 116 N. Y. 625, 23 N. E. 24, Mechem's Cas. 553, Wambaugh's Cas. 652, cited *ante* § 465, note.

[21] See Greenburg v. Palmieri (1904), 71 N. J. L. 83, 58 Atl. 297; Reid v. Miller (1910), 205 Mass. 80, 91 N. E. 223; Steele-Smith Grocery Co. v. Potthast (1899), 109 Iowa 413, 80 N. W. 517; Merrill v. Kenyon (1880), 48 Conn. 314, 40 Am. Rep. 174; Thompson v. Davenport (1829), 9 B. & C. 78, Mechem's Cas. 547, Wambaugh's Cas. 637.

Knowledge is necessary, not merely the means of obtaining it. Raymond v. Crown Mills (1841), 43 Mass. (2 Metc.) 319.

before he received such knowledge will ordinarily not bind him as an election.[22] And even *with* such knowledge, the mere presentation of a claim against the agent[23] or even the commencement of a suit against him,[24] will not, it has been held, be conclusive evidence of an election to hold the agent only. Prosecuting the action to a judgment after knowledge, however, is usually held conclusive.[25] There is some authority for what seems the better rule, namely, that nothing short of satisfaction of the judgment should be a bar.[26]

Merely making entries against the agent or charging goods to him after knowledge would not be conclusive. Taking the agent's note with knowledge, if not expressly or by implication taken as *payment*, is not ordinarily conclusive.

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[22] Taking agent's note before knowledge of the principal does not bar action against principal: Harper v. Bank (1896), 54 Ohio St. 425, 44 N. E. 97; Merrill v. Kenyon (1880), 48 Conn. 314, 40 Am. Rep. 174, Wambaugh's Cas. 720.

Nor does taking judgment against the agent under such circumstances constitute election to hold him only; Greenburg v. Palmieri (1904), 71 N. J. L. 83, 58 Atl. 297, Goddard's Cas. 755; Lindquist v. Dickson (1906), 98 Minn. 369, 107 N. W. 958, 8 Ann. Cas. 1024, 6 L. R. A. (N. S.) 729, Goddard's Cas. 758.

[23] See Curtis v. Williamson (1874), L. R. 10 Q. B. 57, Wambaugh's Cas. 713; Hoffman v. Anderson (1902), 112 Ky. 893, 24 Ky. L. Rep. 44, 67 S. W. 49.

[24] See Raymond v. Crown Mills (1841), 43 Mass. (2 Metc.) 319; Cobb v. Knapp (1877), 71 N. Y. 348, 27 Am. Rep. 51.

[25] See Priestly v. Fernie (1865), 3 H. & C. 977, Wambaugh's Cas. 698; Kingsley v. Davis (1870), 104 Mass. 178, Wambaugh's Cas. 702; Tuthill v. Wilson (1882), 90 N. Y. 423, Goddard's Cas. 756; Lindquist v. Dickson (1906), 98 Minn. 369, 107 N. W. 958, 8 Ann. Cas. 1024, 6 L. R. A. (N. S.) 729, Goddard's Cas. 758; Murphy v. Hutchinson (1908), 93 Miss. 643, 48 So. 178, 17 Ann. Cas. 611, 21 L. R. A. (N. S.) 785.

Principal and agent cannot usually be joined in one action, though a few cases have permitted the plaintiff in a doubtful case to join both up to the time of judgment, when he must elect which one he will hold: See Gay v. Kelley (1909), 109 Minn. 101, 123 N. W. 295, 26 L. R. A. (N. S.) 742; Mussender v. Raiffe (1907), 131 Ill. App. 456.

[26] See Beymer v. Bonsall (1875), 79 Pa. 298, Mechem's Cas. 554, disapproved in Barrell v. Newby (1904), 62 C. C. A. 382, 127 Fed. 656.

§ 469. —— 2. Settlement with or payment to agent.—2. The principal can not be held where, before the other party presents his claim, the principal has in good faith settled with, credited or paid the agent* relying upon some conduct of the other party from which it was reasonable to infer that the agent has already settled with such third party, or that the latter looks exclusively to the agent for payment.[27]

What such misleading conduct may be, cannot be determined by any fixed rule. It must be something which fairly and reasonably leads the principal to act upon the belief that his credit is not relied upon by the other party.

§ 470. Actual agency must exist.—The intermediate party in these cases must be an agent and not a principal. Thus if A orders goods of B, a dealer, and B not happening to have the goods, procures them from C, another dealer, on credit and supplies them to A, C cannot on these facts recover the price from A, as an undisclosed principal, if B does not pay C. B was not an agent at all.[28]

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[27] See Thompson v. Davenport (1829), 9 Barn. & Cress. 78, Mechem's Cas. 547, Goddard's Cas. 743, Wambaugh's Cas. 637; Heald v. Kenworthy (1855), 10 Exch. 739, Goddard's Cas. 747, Wambaugh's Cas. 692; Armstrong v. Stokes (1872), L. R. 7 Q. B. 598, Wambaugh's Cas. 704; Irvine v. Watson (1880), 5 Q. B. Div. 414, Mechem's Cas. 550, Wambaugh's Cas. 715.

The American cases, so far as they have considered the subject, in general support the rule only so far as the *. See Fradley v. Hyland (1888), 37 Fed. 49, 2 L. R. A. 749; Laing v. Butler (1885), 37 Hun, (N. Y.) 144 (aff'd 108 N. Y. 637, 50 N. E. 442); Thomas v. Atkinson (1871), 38 Ind. 248; Clealand v. Walker (1847), 11 Ala. 1058, 46 Am. Dec. 238; McCullough v. Thompson (1879), 45 N. Y. Super. 449; Harder v. Printing Co. (1909), 64 N. Y. Misc. 89, 117 N. Y. Supp. 1001; Knapp v. Simon (1884), 96 N. Y. 284, 6 Civ. Proc. R. 1, (dictum); Southern Ry. Co. v. Simpkins (1919), 178 N. Car. 273, 100 S. E. 418, 10 A. L. R. 731.

But see York County Bank v. Stein (1866), 24 Md. 447; Simmons Hardware Co. v. Todd (1901), 79 Miss. 163, 29 So. 851; Guest v. Opera House Co. (1888), 74 Iowa 457, 38 N. W. 158; 23 American Law Review, 565.

It is believed that the English rule is the right one, and that it will be followed in the United States. The principal need not, and it is believed should not, settle with the agent without demanding evidence that the other party is either paid or looks only to the agent for payment.

So the contract must have been an authorized one. There is no more warrant for holding an undisclosed principal upon an unauthorized contract, than there is for holding a disclosed principal in such a case.[29]

One qualification of this, not easy to explain, is that where an undisclosed principal has put an agent in charge of a business to be carried on in the agent's name,—thus making him appear to be the *owner* rather than an *agent*—the undisclosed principal may be held for contracts of a sort usually made by one carrying on a similar business, even though they were made in flat violation of the instructions of the principal.[30]

§ 471. **Principal must really have been undisclosed.**—The case, moreover, presupposes that the principal at the time of the contract was really undisclosed. For if he were known at the time of the transaction and the other party nevertheless elected to give credit to the agent only, he cannot afterwards charge the principal.[31] Whether exclusive credit was given to the agent or not is usually a question of fact, as has been seen.

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[28] Compare Stoddard v. Ham (1880), 129 Mass. 383, 37 Am. Rep. 369.

Where the relation of principal and agent did not exist in the case, "there can be neither agent to bind, nor undisclosed principal to be bound." Brown v. Title & Trust Co. (1896), 174 Pa. 443, 34 Atl. 335. Kayton v. Barnett, referred to in note, § 465, is difficult to reconcile with this theory.

[29] See Young v. Inman (1910), 146 Iowa 492, 125 N. W. 177; Moline v. Neville (1893), 38 Neb. 433, 56 N. W. 983; Dickerson v. Rogers (1889), 114 N. Y. 405, 21 N. E. 992.

[30] See Hubbard v. Ten Brook (1889), 124 Pa. 291, 16 Atl. 817, 10 Am. St. R. 585, 2 L. R. A. 823, Mechem's Cas. 367; Watteau v. Fenwick [1893], 1 Q. B. Div. 346, Mechem's Cas. 369, Wambaugh's Cas. 654; Kinahan v. Parry [1910], 2 K. B. 389; Brooks v. Shaw (1908), 197 Mass. 376, 84 N. E. 110; Napa Valley Wine Co. v. Cassanova (1909), 140 Wis. 289, 122 N. W. 812; Miss. Valley Const. Co. v. Abeles (1908), 87 Ark. 374, 112 S. W. 894; Patrick v. Merc. Co. (1903), 13 N. Dak. 12, 99 N. W. 55.

Compare Ewart on Estoppel, 246; 37 Solicitors' Journal 280; 9 Law Quar. Review 111; 10 Columbia Law Review 763.

[31] See Paterson v. Gandasequi (1812), 15 East 62, Mechem's Cas. 545, Goddard's Cas. 738, Wambaugh's Cas. 527; Addison v.

The exemption of the principal, in such a case, is obviously strengthened by the fact that he has settled with the agent supposing that the third party looked to the agent only.[32]

§ 472. **Agent also remains liable.**—This liability of the undisclosed principal, as has been stated, is an additional, and not an exclusive one; that is to say, the third person is not obliged to pursue the principal when discovered. He *may* do so at his option. The agent also remains liable, and the creditor, if he prefers, may pursue him because he was the party with whom he contracted, though of course, he can have but one satisfaction.

II. RESPONSIBILITY FOR AGENT'S DECLARATIONS, REPRESENTATIONS AND ADMISSIONS.

§ 473. **What statements, etc., bind the principal.**—The responsibility of the principal is not necessarily confined to what the agent *does;* it may in many cases include also what he *says.* Very few acts are unaccompanied by words, and, as is entirely obvious, the agent who is authorized to deal for his principal,—to buy and sell or to make contracts of any sort,—must in the nature of the case be authorized to use the words, whether written or unwritten, which are necessary and proper to accomplish the desired end.[33] An agent may also be authorized expressly and primarily to make statements or representations, as in the case of one who is employed to advertise and promote an enterprise.

§ 474. —— But even where his chief duty is to *act*—and

Gandasequi (1812), 4 Taunt. 574, Mechem's Cas. 547, Wambaugh's Cas. 529; Thompson v. Davenport (1829), 9 Barn. & Cr. 78, Mechem's Cas. 547, Wambaugh's Cas. 637; James v. Bixby (1814), 11 Mass. 34; Brown v. Rundlett (1844), 15 N. H. 360; Ferguson v. McBean (1891), 91 Cal. 63, 27 Pac. 518, 14 L. R. A. 65.

[32] See Cleveland v. Pearl (1890), 63 Vt. 127, 21 Atl. 261, 25 Am. St. R. 748, Mechem's Cas. 556; James v. Bixby, *supra.*

[33] See *ante* § 281.

that is the case principally to be dealt with here—the authority to act will include, by implication, the saying of whatever, if anything, naturally, usually and appropriately accompanies, attends or otherwise forms a part of the thing done.

So where what he said at the time characterizes or illuminates the act, it is admissible because evidence of the act is admissible. As was said in one case, "His declarations were admissible, not so much perhaps for what he said as what he did; what he said shed light upon what he did, and we are thus enabled to scrutinize his acts according to his real intention."[34]

§ 475. At what time made.—The authority to bind the principal by what is thus said is implied because it is deemed to be a part of the act authorized to be done—because it tends to characterize or explain it, or because it is a natural and appropriate accompaniment of it. It follows, therefore, that the authority exists *only while the act is being performed.* The agent has no implied authority to make narrations concerning past transactions.[35] It is only while he is acting, within the scope of his authority, that the statements are relevant. Hence the rule that, in order to be considered as made within the scope of his authority, the statements, representations or admissions must be made either while the agent is actually engaged in the execution of his authority, or at least so soon thereafter as to be really a part of the same transaction. In legal phrase it is said that they must constitute a part of the *res gestæ*,—a phrase, however, which it has been found exceedingly difficult to define with accuracy, and which is often confused with another use of the same phrase to be referred to hereafter.[36]

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[34] Sidney School Furniture Co. v. Warsaw Dist. (1888), 122 Pa. 494, 15 Atl. 881, 9 Am. St. R. 124.

[35] See Vicksburg, etc., R. Co. v. O'Brien (1886), 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299, Mechem's Cas. 572; Packet Co. v. Clough (1874), 87 U. S. (20 Wall.) 528, Wambaugh's Cas. 459; Garth v. Howard (1832), 8 Bing. 451, Goddard's Cas. 839, Wambaugh's Cas. 452; Carroll v. Railroad Co. (1889), 82 Ga. 452, 10 S. E. 163, 6 L. R. A. 214; Barker v. St. Louis, etc., R. Co. (1894), 126 Mo. 143, 28 S. W. 866, 47 Am. St. R. 646, 26 L. R. A. 843; Giberson v. Mills Co. (1896), 174 Pa. 369, 34 Atl. 563, 52 Am. St. R. 823; Moyle v. Congregational Society (1897), 16 Utah 69, 50 Pac. 806, Goddard's Cas. 841; Jammison v. Railway Co. (1895), 92 Va. 327, 23 S. E. 758, 53 Am. St. R. 813.

Where the transaction is a continuing one, made up of a series of acts, the transaction for the purpose in question may continue until it is completed: Cleveland, etc., Ry. Co. v. Closser (1898), 126 Ind. 348, 26 N. E. 159, 22 Am. St. R 593, 9 L. R. A. 754

§ 476. —— Declarations characterizing the act.—Under this rule, a wide range of declarations and statements is included. For example, those showing what sort of an act the agent *purported* to do; for which of several parties he *purported* to act; with whom or upon whose credit, the dealings *purported* to be had; by what authority he *purported* to act; for what reason or on what information he then *purported* to do what he did do; and the like.[37]

This evidence is not admissible for the purpose of proving the agency,—*that* must be shown by other evidence,[38]—but merely for the purpose of showing the character or capacity in which the agent at the time purported to act.

§ 477. —— Declarations forming part of the act.—The cases which fall under this head, are of an exceedingly wide range, and difficult to include within any specific rule. What statements are to be deemed part of an act must, of course, be determined by the nature and extent of that act. But, in general terms, if an agent is authorized to do an act, all that one would naturally, ordinarily and appropriately say while doing such an act and with reference to it, would be included. Giving directions, making arrangements, expressing satisfaction or dissatisfaction with proposed plans or performances, making statements or giving assurances as to physical conditions within his knowledge which are immediately material; and the like, fall within this rule.[39]

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[36] See *post* § 480.

[37] See Roebke v. Andreas (1870), 26 Wis. 311; Thomas v. Leonard (1843), 5 Ill. 556; Nowell v. Chipman (1898), 170 Mass. 340, 49 N. E. 631; Henderson v. Coleman (1911), 19 Wyo. 183, 115 Pac. 439, 1136; Drum v. Harrison (1887), 83 Ala. 384, 3 So. 715 (that he acted as agent and not as owner); Jefferds v. Alvard (1890), 151 Mass. 94, 23 N. E. 734 (to show state of mind).

[38] See *post* § 484.

§ 478. —— Admissions of default, negligence, etc.—The greatest difficulty in this field arises over the question of the admissibility against the principal of admissions of default, misdoing or negligence by the agent, who in this case is usually of the type designated in the law as a servant.

Anyone may, in general, confess his own defaults, and make admissions against his own interest; but no one ordinarily can *confess* somebody else's fault, or make *admissions* against some one else's interest.[40] The ordinary agent or servant can not usually be deemed *authorized,* expressly or by implication, to make admissions of this sort against his principal,[41] and the fact that the principal is sought to be held liable because of the negligence or default of the very agent or servant who made the admission concerning it, cannot change the rule.[42] (If the agent or servant himself is being sued, his admissions would bind him.)

Such admissions will, in the nature of the case ordinarily be made *after* the act is done; one cannot confess an act before he has done it, or, usually, while he is doing it.

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[39] See Worthington v. Gwin (1898), 119 Ala. 44, 24 So. 739, 43 L. R. A. 382; Rahm v. Deig (1889), 121 Ind. 283, 23 N. E. 141; Des Moines Land Co. v. Homestead Co. (1890), 82 Iowa 663, 45 N. W. 773; Garfield Coal Co. v. Rockland Line (1903), 184 Mass. 60, 67 N. E. 863, 100 Am. St. R. 543, 61 L. R. A. 946; Toll Bridge Co. v. Betsworth (1862), 30 Conn. 380; Holmes v. Lumber Co. (1890), 150 Mass. 535, 23 N. E. 305, 6 L. R. A. 283.

[40] See Fairlie v. Hastings (1803), 10 Ves. Jr. 123, Wambaugh's Cas. 447.

[41] See Clancy v. Barker (1904), 71 Neb. 83, 98 N. W. 440, 103 N. W. 446, 115 Am. St. R. 559, 8 Ann. Cas. 682, 69 L. R. A. 642; Guerin v. Telephone Co. (1899), 70 N. H. 133, 46 Atl. 185; Norfolk, etc., R. Co. v. Lumber Co. (1896), 92 Va. 413, 23 S. E. 737; McDermott v. Railroad Co. (1881), 73 Mo. 516, 39 Am. Rep. 526; Oil City Fuel Co. v. Boundy (1888), 122 Pa. 449, 15 Atl. 865; Jungworth v. Railroad Co. (1909), 24 S. Dak. 342, 123 N. W. 695.

[42] See Williamson v. Railroad Co. (1887), 144 Mass. 148, 10 N. E. 790; Ryan v. Gilmer (1877), 2 Mont. 517, 25 Am. Rep. 744; Frye v. Railroad Co. (1906), 200 Mo. 377, 98 S. W. 566, 8 L. R. A. (N. S.) 1069.

§ 479. —— Nevertheless, the cases in which what the agent or servant declared or admitted may affect the principal by way of admission or otherwise, are numerous. Not only his declarations or statements which characterize or form part of the act are admissible; but those also for example, which show knowledge or the lack of it, at the time, where that is material to the issue; and those which show the agent's or servant's state of mind, where that is material, as where the question is whether his mind was on his work—whether he was heedless or inattentive; or whether he was excited, angry, or acting for his own purposes only.[43]

§ 480. —— **Spontaneous declarations.**—Moreover, under a rule of evidence, not of agency, which permits the spontaneous declarations, made at the time, under the excitement and impulse of the moment, and before time for deliberation and calculation of consequences, of any one present at a transaction whether agent or servant or not, to be shown as part of that act,[44] spontaneous declarations and utterances of a servant or agent have often been received, in actions against the principal, if made substantially at the time of the act, and before its influences have exhausted themselves. These utterances are also designated part of the *res gestæ,* though clearly upon a different theory from that which permits the use of that phrase in a preceding section; but they are frequently confused.

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[43] See Jefferds v. Alvard (1890), 151 Mass. 94, 93 N. E. 734; Reddick v. Young (1912), 177 Ind. 632, 98 N. E. 813; Gulf, etc., Ry. Co. v. Compton (1890), 75 Tex. 667, 13 S. W. 667; Nashville, etc., R. Co. v. Messino (1853), 33 Tenn. (1 Sneed) 220; Wabash R. Co. v. Brow (1895), 13 C. C. A. 222, 65 Fed. 941.

[44] The theory is that the circumstances under which such utterances are made sufficiently insure the speaking of the truth to justify dispensing with the ordinary safeguards of the oath, danger of punishment for perjury, etc. In the case of so-called "dying declarations," there are thought to be further sanctions in the imminence of death, etc. They are not confined to agency cases, but are frequently resorted to in homicide cases, insurance cases, and the like. See Commonwealth v. Puntario (1922), 271 Pa. 501, 115 Atl. 831; New Mexico v. Eagle (1910), 15 New Mex. 609, 110 Pac. 862, 30 L. R. A. (N. S.) 391; Gipe v. State (1905), 165 Ind. 433, 75 N. E. 881, 112 Am. St. R. 238; 1 L. R. A. (N. S.) 419; Meyer v. Insurance Co. (1915), 130 Minn. 242, 153 N. W. 523; Noland v. Morris (1922), — Mo. App. —, 248 S. W. 627.

§ 481. —— In order to be properly admissible under this rule, the utterances must be of matters to which the declarant might have testified as a witness—they must be relevant to the issue, they must be of matters of fact and not the mere opinions, conclusions or speculations of the declarant, and they must relate to the transaction in question, and not be merely narrations of other and previous facts, conditions or events, not involved in the present issue.[45]

§ 482. —— As to the time when the utterances must be made, no more precise rule can be laid down than that they must be made under the immediate influence of the act, and before there was time or opportunity for premeditation, deliberation as to consequences, framing plausible excuses or accusations, and the like.

Unfortunately the decided cases are in great conflict as to this subject.

§ 483. —— They may be offered by either party—by the defendant to show the plaintiff's own negligence, for example, as well as by the plaintiff to show the defendant's fault.

§ 484. Agent's admissions, etc., not competent to prove his

Where the declarant was rendered unconscious, utterances made upon regaining consciousness have been held to be within the rule as to time, even though made some time after the injury. See Clark v. Davis (1922), — Minn. —, 190 N. W. 45; Butten v. Power Co. (1910), 59 Wash. 440, 110 Pac. 20, 140 Am. St. Rep. 858 (compare Hobbs v. Railway Co. (1914), 80 Wash. 678, 142 Pac. 20); Smith v. Stoner (1914), 243 Pa. 57, 89 Atl. 795.

[45] See Hobbs v. Railway Co., *supra.*

agency.—All discussion of the admissibility of the agent's declarations, representations or admissions, presupposes that he *is* an agent as he is assumed to be. This is a fundamental fact, and, as has been seen,[46] it cannot be proved merely by the agent's extra-judicial assertions or admissions; though his *testimony* in court as a witness is competent for what it is worth, like that of any other witness.[47] In order, therefore, to make any evidence of his declarations, representations or admissions competent, there must be some other evidence of his agency.

III. RESPONSIBILITY FOR MATTERS BROUGHT TO NOTICE OR KNOWLEDGE OF AGENT.

§ 485. **When notice to agent is notice to principal.**—The question of notice or knowledge occupies a large place in our law. The duty to take action often arises only upon notice of some fact or condition; the obligation to make repairs or take precautions exists often only upon notice of their need; whether one obtains a perfect title or a defeasible one depends in many cases upon his having or not having notice of prior liens or defenses; etc. Assuming that notice or knowledge might, in a given case, affect the principal if it came to him personally, the question at once arises, how will he be affected by notice to or knowledge of his agent?

§ 486. —— **The general rule.**—In respect of this, the general rule is, that the law charges the principal with notice of any fact, relating to the subject matter of the agency, which the agent acquires or obtains while acting as such agent and within the scope of his authority. Many, but not all, cases go further and charge the principal not only with the notice or knowledge which the agent acquires during the agency, but also with that which he may previously have acquired and then has in mind, or which he had acquired so recently as to reasonably warrant the assumption that he then remembered it.[48]

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[46] See *ante* § 112.

[47] See *ante* § 114.

[48] See Dresser v. Norwood (1864), 17 Com. B. (N. S.) 466; Rolland v. Hart (1871), L. R. 6 Ch. App. 678; The Distilled Spirits

§ 487. —— Basis of rule.—The rule that notice to the agent is notice to the principal, is sometimes said to find its origin in a theory of the legal identification, during the time of the agency, of the principal with the agent—a theory which is thought to lead to the conclusion that notice acquired before the agency, when there could be no such identification, could not be imputed to the principal.

By the weight of modern authority, however, the rule springs from the actual or presumed performance of the duty, already considered, resting upon the agent to inform his principal of all matters coming to his notice or knowledge, concerning the subject matter of the agency, which it is material for the principal to know for his protection or guidance.[49] So far as third persons are concerned, however, the law will not permit the principal to escape the consequences of notice by alleging that his own agent has not performed his duty. The rule, therefore, does not depend upon whether or not the agent has actually communicated his knowledge to the principal; the law presumes

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(1870), 78 U. S. (11 Wall.) 356, 20 L. Ed. 167, Goddard's Cas. 783; Constant v. University (1889), 111 N. Y. 604, 19 N. E. 631, 7 Am. St. R. 769, 2 L. R. A. 734, Mechem's Cas. 560; Field v. Campbell (1904), 164 Ind. 389, 72 N. E. 260, 108 Am. St. R. 301, Goddard's Cas. 777; McClelland v. Saul (1901), 113 Iowa 208, 84 N. W. 1034, 86 Am. St. R. 370; Snyder v. Partridge (1891), 138 Ill. 173, 29 N. E. 851, 32 Am. St. R. 130; Schwind v. Boyce (1902), 94 Md. 510, 51 Atl. 45; Wilson v. Ins. Ass'n (1886), 36 Minn. 112, 30 N. W. 401, 1 Am. St. R. 659; Cabin Branch Min. Co. v. Hutchison (1911), 112 Va. 37, 70 S. E. 480, Ann. Cas. 1912D, 93; Brothers v. Bank (1893), 84 Wis. 381, 54 N. W. 786, 36 Am. St. R. 932; Gardiner v. Building Corp. (1921), — C. C. A. —, 273 Fed. 441, 17 A. L. R. 431.

Certain of the State courts limit the rule to knowledge acquired during the agency. Thus, Alabama, Wheeler v. McGuire (1888), 86 Ala. 398, 5 So. 190, 2 L. R. A. 808, Mechem's Cas. 362; Pennsylvania, Houseman v. Girard, etc., Ass'n (1876), 81 Penn. St. 256; Texas, Kauffman v. Robey (1883), 60 Tex. 308, 48 Am. Rep. 264; Washington, Meyers v. Gerhart (1909), 54 Wash. 657, 103 Pac. 1114.

Notice after the termination of the agency, of course, does not bind: Boardman v. Taylor (1881), 66 Ga. 638.

[49] See *ante* § 342.

that he has done so and charges the principal, although in fact he knew nothing about it.[50]

Under such a rule, it might be the duty of the agent to inform his principal of what he had learned before he became agent but still knew, as well as of that which he learned during the agency.

§ 488. —— **Limitations.**—The notice or knowledge of a particular agent which is so to be imputed to the principal must relate to the subject matter of that agent's agency, and not to some other matter concerning which he had neither duty nor authority.[51] It must appear to be material, and it must come from such an apparently authentic and reliable source that an ordinarily prudent man would be bound to give heed to it.[52]

§ 489. —— The notice must also ordinarily relate to some extrinsic fact, and not be merely the agent's own knowledge of his own purposes, motives or acts.[53]

§ 490. **Notice of what facts—Illustrations.**—Under the general rule, notice of a great variety of facts or conditions has been imputed. Common cases are those involving notice of liens, outstanding equities, unrecorded mortgages; of the dissolution of partnership; of the revocation of the authority of agents; of other insurance; of breaches of conditions; of defects in premises, and the like.

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[50] The principal's remedy in such a case would be against the agent for not informing him.

[51] See Atchison, etc., R. v. Benton (1889), 42 Kan. 698, 22 Pac. 698; Trentor v. Pothen (1891), 46 Minn. 298, 49 N. W. 129, 24 Am. St. R. 225; Pennoyer v. Willis (1894), 26 Oreg. 1, 36 Pac. 568, 46 Am. St. R. 594; Congar v. Railroad Co. (1860), 24 Wis. 157, 1 Am. Rep. 164; Washington Nat. Bank v. Pierce (1893), 6 Wash. 491, 33 Pac. 972, 36 Am. St. R. 174.

[52] Agent not bound to charge his mind with mere rumors or loose information: Shafer v. Insurance Co. (1881), 53 Wis. 361, 10 N. W. 381. "Vague rumor or suspicion" not enough: Stanley v. Schwalby (1896), 162 U. S. 255, 16 Sup. Ct. 754, 40 L. Ed. 960.

[53] See Shepard & Morse Lumber Co. v. Eldridge (1898), 171 Mass. 516, 51 N. E. 9, 68 Am. St. R. 446, 41 L. R. A. 617; Clement v. Amusement Co. (1906), 70 N. J. Eq. 677, 67 Atl. 82, 118 Am. St. R. 747, Goddard's Cas. 779; Los Angeles Inv. Co. v. Bank (1919), 180 Cal. 601, 182 Pac. 293, 5 A. L. R. 1193.

§ 491. **Exceptions to the rule.**—Three exceptions to the rule exist: Such notice will not be charged to the principal—

1. Where it is such as it is the agent's duty to some other principal not to disclose. Thus, for example, much information comes to an attorney which it is his duty to his client not to disclose—in the language of the law, it is privileged. Such information will not be imputed to another client of the attorney, because the law will not require him to violate his duty to one client in order to perform what otherwise might be his duty to some other client.[54] Many cases extend the exception, in the case of attorneys, to other than purely confidential matters.[55]

2. Where the agent, though nominally acting as such, is really acting in his own or another's interest and adversely to his principal. In such a case, the agent really ceases to be agent at all. As has been seen, the law does not permit him without the full knowledge and consent of the principal, to act as agent in such a case, and therefore it is said that the law does not presume that he will perform a duty which his adverse interest renders certain that he will not perform. The real reason, however, is that there is no agency in such a case.[56]

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[54] See The Distilled Spirits (1870), 78 U. S. (11 Wall.) 356, 20 L. Ed. 167, Goddard's Cas. 783; Melms v. Pabst Brewing Co. (1896), 93 Wis. 153, 66 N. W. 518, 57 Am. St. R. 899; Akers v. Rowan (1890), 33 S. Car. 451, 12 S. E. 165, 10 L. R. A. 705.

[55] See Trentor v. Pothen (1891), 46 Minn. 298, 49 N. W. 129, 24 Am. St. R. 225; Wittenbrock v. Parker (1894), 102 Cal. 93, 36 Pac. 374, 41 Am. St. R. 172, 24 L. R. A. 197; Florence v. De Beaumont (1918), 101 Wash. 356, 172 Pac. 340, 4 A. L. R. 1565. See the extended Note in 4 A. L. R. 1592 *et seq.*

[56] See Frenkel v. Hudson (1886), 82 Ala. 158, 2 So. 758, 60 Am. Rep. 736; Purseley v. Stahley (1905), 122 Ga. 362, 50 S. E. 139, Goddard's Cas. 788; Seaverns v. Hospital (1898), 173 Ill. 414, 50 N. E. 1079, 64 Am. St. R. 125; Dillaway v. Butler (1883), 135

Where the agent is frankly and openly acting adversely and for himself only, he is not an agent within the rule.[57]

3. Where the person who claims the benefit of the notice had colluded with the agent to cheat or defraud the principal. "The rule which charges the principal with what the agent knows," it was said in one case,[58] "is for the protection of innocent third persons, and not those who use the agent to further their own frauds upon the principal."

492. Notice to sub-agent.—Whether notice to a sub-agent is notice to the principal depends upon whether the sub-agent, under the rules already considered, is to be regarded as the agent of the principal or of the original agent only.[59] If,

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Mass. 479; Allen v. Railroad Co. (1889), 150 Mass. 200, 22 N. E. 917, 15 Am. St. R. 185, 5 L. R. A. 716; Henry v. Allen (1896), 151 N. Y. 1, 45 N. E. 355, 36 L. R. A. 658; Gunster v. Power Co. (1897), 181 Pa. 327, 37 Atl. 550, 59 Am. St. R. 650; Victor Gold Min. Co. v. Bank (1897), 15 Utah 391, 49 Pac. 826; Baker v. Berry Hill Co. (1911), 112 Va. 280, 71 S. E. 626; Thomson, etc., Co. v. Capitol Co. (1894), 12 C. C. A. 643, 22 U. S. Ap. 669, 65 Fed. 341.

[57] See Innerarity v. Bank (1885), 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710, Mechem's Cas. 569; Corcoran v. Cattle. Co. (1890), 151 Mass. 74, 23 N. E. 727; English-Amer. Loan Co. v. Hiers (1908), 112 Ga. 823, 38 S. E. 103; *In re* Plankinton Bank (1894), 87 Wis. 378, 58 N. W. 784.

Where one person is agent for two principals, many difficult questions arise, as, for example, where he is secretly taking money or securities from one to make good his deficiency to the other. See Bank of New Milford v. Town (1869), 36 Conn. 93; Loring v. Brodie (1883), 134 Mass. 453; Atlanta Cotton Mills v. Indian Orchard Mills (1888), 147 Mass. 268, 17 N. E. 496, 9 Am. St. R. 698; Holden v. Bank (1878), 72 N. Y. 286; Fidelity Trust Co. v. Baker (1900), 60 N. J. Eq. 170, 47 Atl. 6.

See also Note in L. R. A. to Brookhouse v. Union Pub. Co. (1905), 73 N. H. 368, 62 Atl. 219, 111 Am. St. R. 623, 2 L. R. A. (N. S.) 993; Note in 21 Michigan Law Review, 919.

[58] National L. Ins. Co. v. Minch (1873), 53 N. Y. 144. See also Hickman v. Green (1894), 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39; Western Mortg. Co. v. Ganzer (1894), 11 C. C. A. 371, 23 U. S. App. 608, 63 Fed. 647; Hudson v. Randolph (1894), 13 C. C. A. 402, 23 U. S. App. 681, 66 Fed. 216.

[59] See *ante* § 180.

having been appointed with the express or the implied authority of the principal, the sub-agent is deemed the agent of the principal, notice to him, within the limits affecting any agent, is notice to his principal; otherwise, it is not.[60]

§ 493. **Notice to one of several agents.**—Notice to one of two or more joint agents is ordinarily notice to the principal. So notice to one of several but not joint agents will be notice to the principal if it relates to matters concerning which that agent is under a duty to disclose it.[61]

§ 494. **Notice to agents of corporations.**—The rules respecting notice are of constant application in the case of corporations.

In the very nature of the case, the ordinary functions of a corporation can only be exercised through the medium of natural persons acting for the corporation, to whom and through whom all notice to the corporation must come. Notice to a corporate officer or agent, therefore, with reference to matters within his authority, is ordinarily notice to the corporation.[62]

[60] See Hoover v. Wise (1875), 91 U. S. 308, 23 L. Ed. 392; Bates v. American Mortgage Co. (1891), 37 S. Car. 88, 16 S. E. 883, 21 L. R. A. 340; Merritt v. Huber (1908), 137 Iowa 135, 114 N. W. 627; Goode v. Ins. Co. (1895), 92 Va. 392, 23 S. E. 744, 53 Am. St. R. 817, 30 L. R. A. 842; Arff v. Ins. Co. (1890), 125 N. Y. 57, 25 N. E. 1073, 21 Am. St. R. 721, 10 L. R. A. 609.

[61] See Brown v. Oattis (1875), 55 Ga. 416; Wittenbrock v. Parker (1894), 102 Cal. 93, 36 Pac. 374, 41 Am. St. R. 172, 24 L. R. A. 197; Phoenix Ins. Co. v. Flemming (1898), 65 Ark. 54, 44 S. W. 464, 67 Am. St. R. 900, 39 L. R. A. 789.

[62] See Johnson v. First National Bank (1891), 79 Wis. 414, 48 N. W. 712, 24 Am. St. R. 722; Morris v. Georgia Loan Co. (1899), 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506; Hotchkiss Co. v. National Bank (1895), 15 C. C. A. 264, 37 U. S. App. 86, 68 Fed. 76; Wilson v. Pauly (1896), 18 C. C. A. 475, 37 U. S. App. 642, 72 Fed. 129; Johnston Harvester Co. v. Miller (1888), 72 Mich. 265, 40 N. W. 429, 16 Am. St. R. 536; Home Ins. Co. v. Mendenhall (1897), 164 Ill. 458, 45 N. E. 1078, 36 L. R. A. 374; Goldstein v. Union Bank (1919), 109 Tex. 555, 213 S. W. 584; Corrigan v. Bobbs-Merrill Co. (1920), 228 N. Y. 58, 126 N. E. 260, 10 A. L. R. 662; Gardiner v. Building Corp. (1921), — C. C. A. —, 273 Fed. 441, 17 A. L. R. 431. (Promoter not an agent within this rule.)

§ 495. —— But by reason of the fact that corporations often have many agents, with a great variety of duties, and scattered, not infrequently, over a wide range of territory, it is indispensable that the notice or knowledge which is sought to be imputed to it should be acquired or possessed while the particular agent in question was acting as such, and should relate to some matter within the scope of his authority.

Notice to an individual director is not *ipso facto* notice to the corporation,[63] though it may be if he is personally acting with reference to the matter.[64]

Notice to a shareholder is ordinarily not notice to the corporation, as the individual shareholder is usually not its agent.[65] The corporation has, however, frequently been charged with knowledge possessed by all of the shareholders.[66]

§ 496. —— The exceptions to the general rule also apply here. The one most frequently applied is the *second*, namely, that if, though sometimes agent, he was not acting as such in the transaction in question, as where, for example, he was openly and frankly dealing with the corporation as an adverse party; or where though ostensibly agent he was really acting adversely to the corporation, and therefore was not to agent at all, the notice which he had will not be imputed.[67]

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[63] See Fairfield Sav. Bank v. Chase (1881), 72 Me. 226, 39 Am. Rep. 319, Goddard's Cas. 786; Ayers v. Mining Co. (1897), 116 Cal. 333, 48 Pac. 221; Home Bank v. Society (1903), 206 Ill. 9, 69 N. E. 17, 99 Am. St. R. 132; Merchants Nat. Bank v. Clark (1893), 139 N. Y. 314, 34 N. E. 910, 36 Am. St. R. 710; Wardlaw v. Oil Mill (1905), 74 S. Car. 368, 54 S. E. 658, 114 Am. St. R. 1004.

[64] See National Secur. Bank v. Cushman (1877), 121 Mass. 490.

So, if he acts with the board upon that matter: Beacon Trust Co. v. Souther (1903), 183 Mass. 413, 67 N. E. 345.

[65] See Franklin Min. Co. v. O'Brien (1896), 22 Colo. 129, 43 Pac. 1016, 55 Am. St. R. 118; Mercantile Nat. Bank v. Parsons (1893), 54 Minn. 56, 55 N. W. 825, 40 Am. St. R. 299; Seeger Refrig. Co. v. Car Co. (1909), 171 Fed. 416.

[66] See Simmons Creek Coal Co. v. Doran (1892), 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063.

[67] See Allen v. South Boston R. Co. (1889), 150 Mass. 200, 22 N. E. 917, 15 Am. St. R. 185, 5 L. R. A. 716; Seaverns v. Presbyterian Hospital (1898), 173 Ill. 414,

IV. PRINCIPAL'S OR MASTER'S LIABILITY FOR HIS OWN DEFAULTS

Before taking up the main question herein involved, it may be well to get one other matter out of the way. And that is that the—

§ 497. Principal or master is liable for his own defaults.— A principal or master is, of course, liable for his own default. This liability may arise from his individual act, or it may arise in connection with his employment of an agent or servant. It is this latter aspect only which will be considered here. A principal or master is, of course, liable for the wrongful acts which he specifically directs his agent or servant to commit, but a principal or master is not ordinarily liable merely because he appointed or employed an agent or servant who has committed a wrong. Such appointment or employment may have been made with due care and in an entirely proper case. But, if a principal or master, who has undertaken a service or owes a duty to another, should knowingly or negligently send or employ an unfit agent or servant to perform the service, or duty, and the injury should directly and foreseeably result from such appointment or employment, a personal liability of the principal or master may result therefrom.[68]

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50 N. E. 1079, 64 Am. St. R. 125; National Bank of Commerce v. Feeney (1897), 9 S. Dak. 550, 70 N. W. 874, 46 L. R. A. 732; Dorr v. Life Ins. Co. (1898), 71 Minn. 38, 73 N. W. 635, 70 Am. St. R. 309; Hadden v. Dooley (1899), 34 C. C. A. 338, 63 U. S. App. 173, 92 Fed. 274; American Surety Co. v. Pauly (1897), 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977, 42 L. Ed. 987.

[68] Thus where one who had contracted to set out trees in a field covered with parched grass, employed men to do the work who, as he knew, were cigarette smokers, and one of them carelessly dropped a lighted match in the grass, from which fire spread and did injury, it was held that the employer was liable. The court said "The question is not whether the men, in dropping lighted matches into the grass, were acting within the scope of their authority, but whether the doing of the act was reasonably to be apprehended by the defendant." Palmer v. Keene Forestry Association (1921), — N. H. —, 112 Atl. 798, 13 A. L. R. 995. Compare Searle v. Parker (1895), 68 N. H. 311, 34 Atl. 744, where a decorator was held not liable for thefts by his servants, it not

§ 498. —— So if a principal or master should know that his agents or servants were so conducting his business as to cause or threaten unnecessary and unjustifiable injury to third persons, and should take no proper measures to prevent or control such conduct, he may be liable for injuries resulting after such failure on his part, even though he might not be liable otherwise.[69]

This liability would result from his own default, and not merely from the rule of *respondeat superior,* which is the subject hereinafter to be considered.

Some cases have extended this doctrine to include the situation in which one entrusts an instrument, though not intrinsically dangerous, like an automobile, to a person known to be incompetent to properly manage it.[70]

Other cases have refused to make that extension.[71]

V. Liability for Agent's or Servant's Torts and Crimes.

§ 499. In general.—It very rarely happens that a principal or master confers express authority for the commission of torts, or contemplates in any way that they shall be committed. It is very rare, too, that the commission of a tort can be of benefit

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appearing that he was guilty of any negligence in employing or superintending them.

[69] In Fletcher v. Railroad Co. (1897), 168 U. S. 135, 42 L. Ed. 411, 18 Sup. Ct. 35, the defendant was held liable, after notice, for dangerous practices of its servants.

So in Hogle v. Frinklin Mfg. Co. (1910), 199 N. Y. 388, 92 N. E. 794, 32 L. R. A. (N. S.) 1038, defendant was held liable for not putting a stop to the practice of its employees, known to defendant, of throwing missiles from the factory windows upon adjacent premises.

Knowledge indispensable: Long v. Railway Co. (1892), 48 Kan. 28, 28 Pac. 977, 30 Am. St. R. 271, 15 L. R. A. 319.

[70] See Gardiner v. Solomon (1917), 200 Ala. 115, 75 So. 621, L. R. A. 1917F, 380, and note; Walker v. Klopp (1916), 99 Neb. 794, 157 N. W. 962, L. R. A. 1916E, 1292, and note (statute here); Taylor v. Stewart (1916), 172 N. Car. 203, 90 S. E. 134 (violation of statute).

[71] See Neubrand v. Kraft (1915), 169 Iowa 444, 151 N. W. 455, L. R. A. 1915D, 691, and note. Compare Wilde v. Pearson (1918), 140 Minn. 394, 168 N. W. 582.

to the principal; it is much more likely to work to his disadvantage. It is likely, therefore, that instead of authorizing a tort, the principal will caution or direct against it, and, in employing agents and servants, will exercise such precautions as he can to employ none but those who will avoid the commission of torts.

Notwithstanding all his precautions, however, and although he may have expressly forbidden the commission of such acts, the principal, in many cases, is held responsible in our law for torts committed by his agents and servants.

English and American law carry this liability of an innocent principal very much further than does the Continental law, and the actual results reached are often harsh, if not absolutely unjust. English and American writers have frequently commented upon this fact,[72] but there seems to be no tendency to mitigate its application.

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[72] Thus, it is said by Sir Frederick Pollock in his treatise on the law of Torts (8th ed., p. 77): "No reason for the rule, at any rate no satisfactory one, is commonly given in our books."

And by Mr. Beven in his work on Negligence. (3d ed., Vol. I, p. 657.) "There is no general rule making one man liable for the negligence of another. The rule of law is the other way. *Culpa tenet suos auctores tantum.* To this law there has long been an exception established,—that the master must answer for the act of his servant when strangers are injured thereby."

And by Mr. Wood in his treatise on Master and Servant (Sec. 277): "The doctrine holding a master liable for the wrongful acts of his servant * * * is in direct antagonism with that broader doctrine, that every person shall be held to answer for his own wrongs; therefore it is regarded with much jealously by the courts, and is circumscribed into as narrow limits as is consistent with the true interests of society."

So the Supreme Court of Louisiana in one case (49 La. Ann. 1471) (1897) said: "We never apply this rule without a sense of the hardship on the master." "To visit a man with heavy damages for the negligence of a servant, when he is able to show that he exercised all possible care and precaution in the selection of him," said Justice Sharswood in Pennsylvania, "is apt to strike the common mind as unjust." (77 Pa. 238. See also 70 Pa. 125; 2 H. & N. 356; 9 Q. B. Div. 340.)

And the Supreme Court of New York has said: "The rule itself does not spring directly from principles of natural justice and

§ 500. —— It must be kept in mind that it is not a question of this remedy or none at all. The agent or servant, as has been seen, is himself practically always legally liable for the tort. If he is not liable, usually no one is liable. It is a question of imputing liability for the actual wrongdoing of one person—the agent or servant—to another person usually innocent of wrongdoing—the principal or master.

It is a striking example of the much discussed doctrine of "liability without fault."[73]

It has, at times, been suggested that the liability be carried still further; that the principal or master be made generally liable, and protect himself by taking a bond from the agent or servant, or by insuring against his liability, as in the case of the Workmen's Compensation Acts. These views have not as yet secured adoption.

§ 501. **Theories of liability.**—Many attempts have been made to account for this rule.[74] Mr. Justice Holmes, in his book on the Common Law, expresses the view that it is largely a survival of the earlier liability of the master for the act of his slave.[75] It is sometimes said that as the principal or master has the power of control, he should take the responsibility. It is said that as he is to get the benefit of the act, he should bear the burdens of it. It is said that, although the principal

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equity." "The dictates of natural justice, disconnected with principles of expediency would indicate that every individual should be responsible for his own wrong and that no person should be punished for the wrong of another." (6 Barb. 238.)

See also, *per* Jessel, M. R. in Smith v. Keal (1882), 9 Q. B. Div. 340, 351.

[73] See, for extended discussion, *Liability Without Fault*, by K. Takayanagi, 16 Illinois Law Review, 163, 268; 17 *id.* 187, 416.

[74] See Wigmore, 7 Harvard Law Review 315, 383; Holmes, "Collected Legal Papers," p. 49, subject "Agency"; 4 Harvard Law Review, 345; 5 *id.* 1; Pollock and Maitland, 2 History of English Law, 528-534; Smith, 23 Columbia Law Review, 444; Mechem, 44 American Law Review, 221; same article, 4 Illinois Law Review, 243; Guy v. Donald (1906), 203 U. S. 399, 27 Sup. Ct. 63, 51 L. Ed. 245.

[75] Pp. 6-20.

a master may be personally innocent, so also is the person injured, and that even as between two equally innocent persons, that one should bear the loss who initiated the enterprise. It is said that making the principal or master liable will induce him to greater care, from which the public will benefit. It is said that since the principal or master is likely to be of greater financial responsibility than the agent or servant—although the latter is liable—and since public policy demands that injuries shall not go uncompensated, the best results are promoted by giving a remedy against the principal.

Doubtless the actual rule is more or less the result of the operation, not only of the historical antecedents, but of all of these reasons of policy.

Accepting the existence of the rule, an attempt will be made to show briefly how and when it is applied. Much of it is a question of Master and Servant rather than of Principal and Agent.

1. *General Conditions of Liability.*

§ 502. I. Relation of principal and agent, or of master and servant must exist.—In order to hold one liable as for the tort of his servant or agent, the person so sought to be held must stand in the relation of principal or master to the one committing the tort. Ordinarily there is little difficulty in determining whether that relation exists, and who are the parties to it. The one who employs the other, controls his action, and pays his wages, will usually be the master.

But there may be liability as a master without a contract, as where one employs his infant son or his slave as his servant. It is usual, but not essential, that wages are to be paid.[76] The service may be gratuitous. Ordinarily there will be, if not express contract, at least express request or direction; but one may become liable as master by informally or tacitly accepting the informal or tacit offer of another to aid or assist him as his servant.[77]

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[76] Thus one may be the servant of a bath-house proprietor though the latter pays him no wages, and he expects to secure his compensation in the form of "tips" or gratuities from patrons. See Gaines v. Bard (1893), 57 Ark. 615, 22 S. W. 570, 38 Am. St. R. 266.

In a particular case, there may appear to be more than one person who bears at least some of the marks of a principal or master, and it is often difficult to choose between them.

§ 503. —— More than one master—Borrowed servant—General master and special master.—One person may be the servant or agent of two or more separate masters. He may act, now for one, and now for another. It is said that there may be a general master and a special master. If I borrow the servant of another for a short period to work for me, he may as to that work be my servant in law, even though all of the time he may remain in the general and continuing employment of the one from whom I borrow him.[78] If, on the other hand, I employ that other person to render some service for me and he sends his servant to perform it, such servant, though he may to a limited extent be under my direction and control, remains in the service of his general master, who will be answerable for his torts.[79] The familiar case of the taxi-cab driver will

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[77] See Hill v. Morey (1854), 26 Vt. 178, Wambaugh's Cas. 149.

[78] One who for his own work, to be done under his own direction, borrows or hires the servant of another, is usually responsible for his negligence while so employed: See Hasty v. Sears (1892), 157 Mass. 123, 31 N. E. 759, 34 Am. St. R. 267; Wood v. Cobb (1866), 95 Mass. (13 Allen) 58, Wambaugh's Cas. 190; Grace & Hyde Co. v. Probst (1904), 208 Ill. 147, 70 N. E. 12; Rourke v. Colliery Co. (1877), L. R. 2 Com. Pl. D. 205, Wambaugh's Cas. 229; Murray v. Currie (1870), L. R. 6 C. P. 24, Wambaugh's Cas. 206; Miller v. Railroad Co. (1888), 76 Iowa 655, 39 N. W. 188, 14 Am. St. R. 258; Powell v. Construction Co. (1890), 88 Tenn. 692, 13 S. W. 691, 17 Am. St. R. 925; Higgins v. Telegraph Co. (1898), 156 N. Y. 75, 50 N. E. 500, 66 Am. St. R. 537; Delaware, etc., R. Co. v. Hardy (1896), 59 N. J. L. 35, 34 Atl. 986; Wagner v. Truck Renting Co. (1922), 234 N. Y. 31, 136 N. E. 229.

Compare New Orleans, etc., R. Co. v. Norwood (1885), 62 Miss. 565, 52 Am. Rep. 191; Standard Oil Co. v. Anderson (1909), 212 U. S. 215, 29 Sup. Ct. 252, 53 L Ed. 480.

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[79] If, having my own carriage but no horses, I hire horses and driver from a stable-keeper, whose servant is the driver while driving? See Laugher v. Pointer (1826), 5 Barn. & C. 547, Wambaugh's Cas. 105; Quarman v. Burnett (1840), 6 Mees. & W. 499, Wambaugh's Cas. 125; Jones v. Scullard [1898], 2 Q. B. 565.

If, an ice company when its business is dull, hires out a team and driver to a coal company, to work in hauling coal wagons, (the driver being retained on the ice company's pay-roll), whose servant is the driver while hauling a coal wagon? See Joslin v. Ice Co. (1883), 50 Mich. 516, 15 N. W. 887, 45 Am. Rep. 54; Ash v. Lumber Co. (1911), 153 Iowa 523, 133 N. W. 888, 38 L. R. A. (N. S.) 973; Morris v. Trudo (1909), 83 Vt. 44, 74 Atl. 387, 25 L. R. A. (N. S.) 33.

If an undertaker, in charge of a funeral, hires a carriage, team and driver from a stable keeper, to be used in carrying persons attending the funeral, whose servant is the driver? See Frerka v. Nicholson (1907), 41 Colo. 12, 92 Pac. 224, 14 Ann. Cas. 730, 13 L. R. A. (N. S.) 1122; Hussey v. Franey (1910), 205 Mass. 413, 91 N. E. 391, 137 Am. St. R. 460.

If an express company undertakes to deliver the goods of a merchant who keeps no wagons of his own, whose servant is the driver in so doing? See Moore v. Stainton (1903), 80 N. Y. App. Div. 295, 80 N. Y. Sup. 244 (aff'd 177 N. Y. 581, 69 N. E. 1127).

Suppose the merchant who wishes to have his own delivery system, hires drivers and teams from an express company. See Howard v. Ludwig (1902), 171 N. Y. 507, 64 N. E. 172.

If a city, contracting for paving with a contractor who has no steam-roller, but must use one, agrees to let him have the city's roller and operator, for a fixed sum, whose servant is the operator while at work on the job? See Stewart v. Improvement Co. (1900), 131 Cal. 125, 63 Pac. 177, 52 L. R. A. 205.

If a steamship company contracts with a stevedore to unload a ship, but agrees that he may use the ship's steam winch and an operator for a fixed consideration, whose servant is the operator? See Murray v. Currie (1870), L. R. 6 C. P. 24, Wambaugh's Cas. 206; Rourke v. Colliery Co. (1877), 2 Com. Pl. D. 205, Wambaugh's Cas. 229. Distinguished in Standard Oil Co. v. Anderson (1909), 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480.

In Delory v. Blodgett (1904), 185 Mass. 126, 69 N. E. 1078, 102 Am. St. R. 328, 64 L. R. A. 114, the court said that the circumstances would often justify a distinction between injuries arising out of the way the general work was being done under the contractor's direction, and those resulting from the care and management of the team, engine, etc., in the care and protection of illustrate this. If I call a taxi-cab, the driver will, in general, and in obedience to the directions of the taxi-cab proprietor, take me to the place I designate, and more or less act upon my suggestions as to speed, etc., but for his negligence while driving to that place the taxi-cab proprietor and not I will ordinarily be responsible.[80]

If I direct my chauffeur to take my guest to his home in the evening, he will ordinarily remain my servant in so doing; but if I loan my car and driver to a friend to be used by him for his purposes, and under his own direction, he and not I will usually be responsible for the negligence of the driver while so driving under his direction.

§ 504. —— Tests for determining.—Many efforts have

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which the driver or operator is supposed to remain the owner's servant.. See also Driscoll v. Towle (1902), 181 Mass. 416, 63 N. E. 922; Shepard v. Jacobs (1910), 204 Mass. 110, 90 N. E. 392, 134 Am. St. R. 648, 26 L. R. A. (N. S.) 442; Lewis v. Railroad Co. (1900), 162 N. Y. 52, 56 N. E. 548; Kellogg v. Church Foundation (1911), 203 N. Y. 191, 96 N. E. 406, Ann. Cas. 1913A, 883, 38 L. R. A. (N. S.), 481; Harding v. Stockyards (1909), 242 Ill. 444, 90 N. E. 205.

Whose servant is the porter on the sleeping-car, in making up the passenger's berth, in carrying his baggage in or out, in polishing his shoes, in brushing his clothes, in running out to mail a letter for him?

If I bargain with a caterer to supply and serve refreshments to my guests at my house, and he sends his waiters to serve, whose servants are the waiters? Suppose I borrow a waitress from my neighbor to assist. Whose servant is she?

In Charles v. Barrett (1922), 233 N. Y. 127, 135 N. E. 199, the court said: "The rule now is that as long as the employee is furthering the business of his general employer by the service rendered to another, there will be no inference of a new relation unless command has been surrendered, and no inference of its surrender from the mere fact of its division. McNamara v. Leipzig (1919), 227 N. Y. 291, 125 N. E. 244, 8 A. L. R. 480; Schweitzer v. Thompson (1920), 229 N. Y. 97, 127 N. E. 904; Meade v. Motor Haulage Co. (1922), 233 N. Y. 527, 135 N. E. 903; Driscoll v. Towle, *supra.*"

[80] See Little v. Hackett (1885) 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 653; Irwin v. Taxi-cab Co. [1912], 3 K. B. 588; Richardson v. Van Ness (1889), 53 Hun (N. Y.) 267, 6 N. Y. Sup. 618, 25 N. Y. St. R. 60.

been made to state the test for determining who is the master in these cases. It is sometimes said to be the power of control,—who has the power to direct his actions and remove him from the service for disobedience? In the case of the taxi-cab driver, I, the passenger, have a limited power of control; I may tell him where I wish to go, but if he will not obey my directions, while I may dismiss him and his cab from my service, I can not dismiss him from the service of the cab proprietor.

The most satisfactory test is to ask whose business was the servant performing, and under whose control? In the case of the taxi-cab, again, while the driver came to enable me to pursue my business, he came fundamentally to perform the business of the cab proprietor. The latter was the one who was in the business of furnishing cabs with drivers, and it was in his business that the driver was employed.

§ 505. —— **Freedom of choice—Compulsory employment.**—Freedom of choice in the selection of an agent or servant is ordinarily one of the characteristics of agency. This freedom may be somewhat restricted by law or fact. If, for example, the law requires all truck men to be licensed, so that I must employ a licensed truckman, this would, in fact, somewhat restrict my choice, but so long as there are ordinarily a considerable number of them, my choice would not be so restricted in law as to deprive the one chosen of the quality of my servant or agent;[81] nor would the fact that I arrived so late in the market place on a particular occasion that most of them were already engaged.

But where the law provides for compulsory pilotage, and the owner of a ship is required to take a pilot, but has no voice in his selection, and can not control him or discharge him, it is held that the owner can not be made liable, at common law, for the pilot's negligence.[82]

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[81] See Martin v. Temperley [1843], 4 Q. B. 298, Wambaugh's Cas. 129. (Licensed watermen, but there were about 6,000 of them.)

[82] See Ramsdell Transp. Co. v. Compagnie Generale Trans-Atlantique (1901), 182 U. S. 406, 21 Sup. Ct. 831, 45 L. Ed. 1155; Guy v. Donald (1906), 203 U. S. 399,

§ 506. —— **Independent contractor.**—Instead of doing a piece of work himself or of hiring his own servants to do it, the person who desires to have it done may often "let the job" to an "independent contractor." The independent contractor, as has been seen, is one who carries on some independent employment, in the course of which he undertakes (or contracts) to perform a given piece of work for another, usually furnishing his own materials, equipment and servants, and being at liberty to perform it under his own direction, and being bound to the employer only to produce the agreed result.

The work is typically a job of some magnitude, like the erection of a building, the construction of a system of sewers, the building of a bridge, and the like. Usually the compensation will be a fixed or "lump" sum; but other methods of payment are permissible, the cost plus a percentage being a common one. Usually also there will be agreed "plans and specifications," in accordance with which the work is to be carried out. Several independent contractors may be employed upon the same work, as where, in the erection of a building, the mason work is let to one contractor, the carpenter work to another, the plumbing to another, and so on.

Such an independent contractor is not a servant or agent of the proprietor within the rules making a principal or master responsible for the torts of his servant or agent; nor are the various workmen employed by the independent contractor the servants or agents of the proprietor within those rules.[83]

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27 Sup. Ct. 63, 51 L. Ed. 245; General Steam Nav. Co. v. British, etc., Nav. Co. (1869), L. R. 4 Exch. 238.

Compare Durkin v. Coal Co. (1895), 171 Pa. 193, 33 Atl. 237, 50 Am. St. R. 801, 29 L. R. A. 808; Fulton v. Mining Co. (1904), 66 C. C. A. 247, 133 Fed. 193.

[83] See Reedie v. Railway Co. (1849), 4 Exch. 244, Wambaugh's Cas. 134; Lawrence v. Shipman (1873), 39 Conn. 586, Wambaugh's Cas. 210; Hedge v. Williams (1901), 131 Cal. 455, 63 Pac. 721, 64 P. 106, 82 Am. St. R. 366; Prest-O-Lite Co. v. Skeel (1914), 182 Ind. 593, 106 N. E. 365, Ann. Cas. 1917A, 474; James v. McMinimy (1892) 93 Ky. 471, 20 S. W. 435, 40 Am. St. R. 200; Pearl v. Railway Co. (1900), 176 Mass 177, 57 N. E. 339, 79 Am. St. R. 302, 49 L. R. A. 826; Gayle v. Car Co. (1903), 177 Mo. 427, 76 S. W. 987; Reisman v. Pub. Serv. Corp.

§ 507. —— Considerable modification of the typical contract is permissible without changing the result. Thus, provision may be made for overseers, inspectors or superintendents to insure compliance with the contract; they may be given the right to object to or reject defective material or work; the right may be reserved to object to, or insist upon the removal of, incompetent workmen, or even to substitute others as the employees of the contractor; it may be agreed that the work shall be done "to the satisfaction" of the owner or proprietor, and the like.[84]

So where several contractors are employed, or various steps must be taken in a particular order to secure the effective performance of the work, provisions may be made for giving the proprietor or his representative authority to give directions or make requirements, as to the order in which the several contractors shall proceed, or the several steps be taken.[85]

Such provisions have not the purpose or effect to control

(1911), 82 N. J. L. 464, 81 Atl. 838, 38 L. R. A. (N. S.) 922; Uppington v. New York (1901), 165 N. Y. 222, 59 N. E. 91, 53 L. R. A. 550; Smith v. Simmons (1883), 103 Pa. 32, 49 Am. Rep. 113; Powell v. Construction Co. (1890), 88 Tenn. 692, 13 S. W. 691, 17 Am. St. R. 925; McHarge v. Newcomer (1906), 117 Tenn. 595, 100 S. W. 702, 9 L. R. A. (N. S.) 298; Bibb v. Railway Co. (1891), 87 Va. 711, 14 S. E. 163; Norfolk, etc., R. Co. v. Stevens (1899), 97 Va. 631, 34 S. E. 525, 46 L. R. A. 367; Richmond v. Sitterding (1903), 101 Va. 354, 43 S. E. 562, 99 Am. St. R. 879, 65 L. R. A. 445; Smith v. Exchange (1895), 91 Wis. 360, 64 N. W. 1041, 51 Am. St. R. 912, 30 L. R. A. 504.

Compare Singer Mfg. Co. v. Rahn (1889), 132 U. S. 518, 10 Sup. Ct. 175, 33 L. Ed. 440, Mechem's Cas. 8, Wambaugh's Cas. 240.

See *Note*, 65 L. R. A. 445, *et seq.;* 66 L. R. A. 119; 18 A. L. R. 801, *et seq.;* 19 A. L. R. 226 *et seq.;* 1168 *et seq.;* 20 A. L. R. 684 *et seq.;* 21 A. L. R. 1229 *et seq.*

[84] See Reedie v. Railway Co., *supra;* Eldred v. Mackie (1901), 178 Mass. 1, 59 N. E. 673; Powell v. Construction Co., *supra;* Smith v. Exchange, *supra;* Harding v. Boston (1895), 163 Mass. 14, 39 N. E. 411; Frassi v. McDonald (1898), 122 Cal. 400, 55 Pac. 139; Ridgeway v. Downing (1899), 109 Ga. 591, 34 S. E. 1028; Montain v. Fargo (1917), 38 N. Dak. 432, 166 N. W. 416, Ann. Cas. 1918D, 826, L. R. A. 1918C, 600.

[85] See Louisville, etc., R. Co. v. Hughes (1910), 134 Ga. 75, 67 S. E. 542; Callan v. Bull (1896), 113 Cal. 593, 45 Pac. 1017.

the details of the work or to destroy the initiative or control of the contractor, but merely to secure the performance of the contract according to its terms.

§ 508. —— On the other hand, the provisions of the contract *may* go so far as to make the proprietor the actual controller and director of the work and to reduce the contractor to a mere agent of the proprietor, and thus destroy the relation of independent contractor and with it destroy the immunity of the proprietor.

Thus, in a variety of cases, it has been held that the stipulations of the contract not only gave the proprietor power to see that the work was performed according to the contract, but also to actually control the extent, the method, the time, and the *particular manner* of doing it.[86] Whether the contract has gone so far as this is often a difficult question of construction, upon which opinions may and do differ.

It is not merely a question of what control the proprietor has in fact exercised, but what control, under the contract, he has the power to exercise.

§ 509. —— While there is usually not much difficulty in distinguishing the independent contractor from a mere servant, particularly in work of magnitude, there are cases in which the industrial rank of the person employed is so humble, or the work to be done so simple, and especially where only a single man is employed to do it, that the question whether he shall be given the standing of an independent contractor, with the consequent freedom from liability of the proprietor, becomes very difficult. If something goes wrong with the plumbing in my house and I send for a plumber, saying that I know nothing about such work and therefore desire him to ascertain what the trouble is and to remedy it, and I then leave the whole matter with him,—if in endeavoring to carry out my request he is guilty of negligence by which my neighbor is injured, may the latter hold me responsible as a master for the negligence of my servant, or may I rely upon the doctrine of the independent contractor?[87] In many cases of small jobs done by a single workman, it has been held that he was merely a servant.[88]

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[86] See Linnehan v. Rollins (1884), 137 Mass. 123, 50 Am. Rep. 287; Derr Constr. Co. v. Gelruth (1911), 29 Okla. 538, 120 Pac. 253; Tuttle v. Lumber Co. (1916), 192 Mich. 385, 158 N. W. 875, Ann. Cas. 1918C 664; Opitz v. Hoertz (1917), 194 Mich. 626, 161 N. W. 866; Carlton County F. Ins. Co. v. Foley (1912), 117 Minn. 59, 134 N. W. 309, 38 L. R. A. (N. S.) 175; First Presbyterian Congregation v. Smith (1894), 163 Pa. 561, 30 Atl. 279, 43 Am. St. R. 808, 26 L. R. A. 504; Cooper v. Seattle (1897), 16 Wash. 462, 47 Pac. 887, 58 Am. St. R. 46; Palma v. Weinman (1909), 15 N. Mex. 68, 103 Pac. 782 (aff'd 232 U. S. 571); Gadsden v. Craft (1917), 173 N. Car. 418, 92 S. E. 174, 20 A. L. R. 662; Singer Mfg. Co. v. Rahn, *supra;* New Orleans etc. R. Co. v. Hanning (1872), 82 U. S. (15 Wall.) 649, 21 L. Ed. 220; Weinman v. De Palma (1914), 232 U. S. 571, 34 Sup. Ct. 370, 58 L. Ed. 733.

Not all of these cases can be reconciled with one another, nor with others in which an opposite conclusion was reached.

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[87] See Bennett v. Truebody (1885), 66 Cal. 509, 6 Pac. 329, 56 Am. Rep. 117 (independent contractor).

[88] See, laborer repairing a drain, Sadler v. Henlock (1855), 4 El. & Bl. 570, Wambaugh's Cas. 152; carpenter repairing an awning, Brackett v. Lubke (1862), 86 Mass. (4 Allen) 138, 81 Am. Dec. 694; blacksmith repairing a coal-hole, Dickson v. Hollister (1889), 123 Pa. 421, 16 Atl. 484, 10 Am. St. R. 533; teamster delivering load of coal, Waters v. Fuel Co. (1893), 52 Minn. 474, 55 N. W. 52, 38 Am. St. R. 564; [cf. Rait v. New England Co. (1896), 66 Minn. 76, 68 N. W. 729; Corrigan v. Elsinger (1900), 81 Minn. 42, 83 N. W. 492]; coal "heaver," Chicago, etc., Ry. Co. v. Bennett (1912), 36 Okla. 358, 128 Pac. 705, 20 A. L. R. 678; man driving a cow, O'Neill v. Blase (1902), 94 Mo. App. 648, 68 S. W. 764; [compare Milligan v. Wedge (1840), 12 Ad. & El. 737, a licensed drover]; laborers moving flour with hand trucks, Hamilton v. Trading Co. (1912), 33 Okla. 81, 124 Pac. 38. See also Singer Mfg. Co. v. Rahn, *supra*.

Contra: See Hexamer v. Webb (1886), 101 N. Y. 377, 4 N. E. 755, 54 Am. Rep. 703; McCarthy v. Portland (1880), 71 Me. 318, 36 Am. Rep. 320; Forsyth v. Hooper (1865), 93 Mass. (11 Allen) 419; Dutton v. Bank (1902), 181 Mass. 154, 63 N. E. 405; Fink v. Furnace Co. (1884), 82 Mo. 276, 52 Am. Rep. 376; McHarge v. Newcomer (1906), 117 Tenn. 595, 100 S. W. 700, 9 L. R. A. (N. S.) 298.

A physician is usually in the rank of an independent contractor: Pearl v. Railway Co. (1900), 176 Mass. 177, 57 N. E. 339, 79 Am. St. R. 302, 49 L. R. A. 826.

One may be a servant, though he furnishes his own tools, etc., or though he drives his own horse or car.[89]

§ 510. —— In a number of situations it is held that the proprietor is responsible by reason of the nature of the work which he causes to be done, although he employed an independent contractor to do it. Thus if the work is in itself illegal, or cannot be done, in the manner specified, without doing an illegal act, or if it would in itself constitute a trespass or a nuisance, or could not be done, in the manner specified, without committing a trespass or creating a nuisance, responsibility for the illegal act, or for the trespass or nuisance, could not be escaped.[90] So, though the injury were not so necessary and

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In Arnold v. Lawrence (1923), — Colo. —, 213 Pac. 129, the court said: "Whether plaintiff was a day laborer, or defendant's servant or employee, or whether he was a contractor, depends upon all the facts of the employment. The measure of his compensation is but one of these facts and not necessarily a controlling one. For the purposes of this case the following definitions are applicable: A servant is one whose employer has the order and control of the work done by him and who directs, or at any moment may direct, the means as well as the end. Powers v. Mass. Hom. Hosp. (1901), 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372. Where the work done involves the furnishing of capital, implements, shop facilities, and assistants, the person undertaking it is a contractor, not a laborer, servant, or employee. Campfield v. Lang (1885), (C. C.) 25 Fed. 128. One who contracts to do certain work for another, furnishing his own laborers, implements, and materials, is a contractor, not a laborer, even though paid by the day. Tod v. Ky. Ry. Co. (1892), 52 Fed. 241, 243, 3 C. C. A. 60, 18 L. R. A. 305."

[89] See Singer Mfg. Co. v. Rahn (1889), 132 U. S. 518, 10 Sup. Ct. 175, 33 L. Ed. 440, Mechem's Cas. 8, Wambaugh's Cas. 240; Patten v. Rea (1857), 2 Com. B. (N. S.) 606, Wambaugh's Cas. 157.

[90] See Ellis v. Sheffield Gas Co. (1853), 2 El. & Bl. 767, Wambaugh's Cas. 148; Southern Ry. Co. v. Lewis (1910), 165 Ala. 555, 51 So. 746, 138 Am. St. R. 77; Ft. Smith Ry. v. Maledon (1906), 78 Ark. 366, 95 S. W. 472; Williams v. Canal Co. (1892), 96 Cal. 14, 30 Pac. 961, 31 Am. St. R. 172; Cleveland, etc., R. Co. v. Simpson (1914), 182 Ind. 693, 104 N. E. 301, 108 N. E. 9; Lexington, etc., R. Co. v. Board of Education (1917), 176 Ky. 541, 195 S. W. 1094; Hunter v. Railway Co.

inevitable as in the cases supposed, if it was still the direct, likely, probable, naturally to be expected result either of the *work itself* or of the *required manner* of doing it, liability of the proprietor would ordinarily follow.[91] These cases are sometimes described as "intrinsically dangerous." If the work can be done, or be done in the required way, without likelihood of injury, only if *special*, and, particularly, *statutory* precautions are taken, many cases hold the proprietor under obligation to see that those precautions are taken.[92]

(1910), 152 N. Car. 682, 68 S. E. 237, 136 Am. St. R. 854, 29 L. R. A. (N. S.) 851; Missouri, etc., R. Co. v. Brown (1913) 41 Okla. 70, 136 Pac. 1117, 50 L. R. A. (N. S.) 1124; Weinman v. De Palma (1914), 232 U. S. 571, 34 Sup. Ct. 370, 58 L. Ed. 733.

Defective Plans: In a variety of cases where the injury resulted, not from the *manner* in which the work was done, but because the work, as *planned* and as required to be done by the contractor, constituted a trespass or a nuisance or a direct menace to safety, the proprietor has been held responsible. Atlanta, etc., R. Co. v. Kimberly (1891), 87 Ga. 161, 13 S. E. 277, 27 Am. St. R. 231; Cloud County v. Vickers (1900), 62 Kan. 25, 61 Pac. 391; Wilkinson v. Spring Works (1889), 73 Mich. 405, 41 N. W. 490.

But the mere making of a contract to do the work "as required by law," without any other evidence of authority or intention to commit a trespass, and where the statute pointed out the way to get consents, would not render the proprietor liable for a trespass by the contractor: Ketcham v. Newman (1894), 141 N. Y. 205, 36 N. E. 197, 24 L. R. A. 102.

[91] See Ohio Southern R. Co. v. Morey (1890), 47 Ohio St. 207, 24 N. E. 269, 7 L. R. A. 701; Norwalk Gas Light Co. v. Norwalk (1893), 63 Conn. 495, 28 Atl. 32; Wilson v. White (1883), 71 Ga. 506, 51 Am. Rep. 269; Jefferson v. Chapman (1889), 127 Ill. 438, 20 N. E. 33, 11 Am. St. R. 136; James v. McMinimy (1892), 93 Ky. 471, 14 Ky. L. Rep. 486, 20 S. W. 435, 40 Am. St. R. 200; Philadelphia, etc., R. Co. v. Mitchell (1908), 107 Md. 600, 69 Atl. 422, 17 L. R. A. (N. S.) 974; Thompson v. Railway Co. (1898), 170 Mass. 577, 49 N. E. 913, 64 Am. St. R. 323, 40 L. R. A. 345; Thomas v. Harrington (1903), 72 N. H. 45, 54 Atl. 285, 65 L. R. A. 742; Hawver v. Whalen (1892), 49 Ohio St. 69, 29 N. E. 1049, 14 L. R. A. 828; McHarge v. Newcomer (1906), 117 Tenn. 595, 100 S. W. 700, 9 L. R. A. (N. S.) 298.

[92] See Barry v. Terkildsen (1887), 72 Cal. 254, 13 Pac. 657, 1 Am. St. R. 55; Spence v. Shultz (1894), 103 Cal. 208, 37 Pac. 220; Atlanta, etc., R. Co. v. Kimberly (1891), 87 Ga. 161, 13 S. E. 277, 27 Am. St. R. 231; Houston, etc.,

§ 511. —— In some cases liability has been based upon the fact that the independent contractor was an incompetent person who has been selected without sufficient care.[93] And in a few cases it has been held that if the contract with the alleged independent contractor was a mere subterfuge to escape liability, the proprietor would be responsible notwithstanding.[94]

§ 512. —— **Volunteers.**—One cannot have the responsibility of a principal or master officiously thrust upon him by one whose aid he did not request, and whose service he has not accepted; though, as has been seen, if he accepts the service as that of one working for him and under his direction, he may become responsible.[95]

§ 513. —— **Strangers assisting servant—Sub-servants.**—The agent or servant has ordinarily, as has been seen, no implied authority to delegate the service to a stranger, *i. e.*, to employ substitutes, or to employ strangers, on the principal's account, as *assistants* to aid him in performing his service.[96] For the negligence of such strangers, therefore, the principal or master cannot be held upon the ground that they were his servants or agents.

In a number of cases, however, the principal or master has

R. Co. v. Meador (1878), 50 Tex. 77; Smith v. Traders' Exchange (1895), 91 Wis. 360, 64 N. W. 1041, 51 Am. St. R. 912, 30 L. R. A. 504.

[93] See Norwalk Gaslight Co. v. Norwalk (1893), 63 Conn. 495, 28 Atl. 32; Brannock v. Elmore (1892), 114 Mo. 55, 21 S. W. 451; Berg v. Parsons (1895), 84 Hun (N. Y.) 60, 31 N. Y. Sup. 1091 (reversed, but not on this point, in 156 N. Y. 109, 50 N. E. 957, 66 Am. St. R. 542, 41 L. R. A. 391. Gray, J. in his dissenting opinion stresses the evidence of the contractor's incompetence).

[94] See Nelson v. Cement Co. (1911), 84 Kan. 797, 115 Pac. 578; Johnson v. Railroad Co. (1911), 157 N. Car. 382, 72 S. E. 1057. Compare Larsen v. Telephone Co. (1911), 164 Mich. 295 129 N. W. 894.

[95] See Hill v. Morey (1854), 26 Vt. 178, Wambaugh's Cas. 149.

Volunteers, injured by the negligence of a servant whom they are assisting, usually stand upon the same footing as fellow-servants, and cannot recover of the master.

[96] See *ante*, §§ 170, 182.

been held liable, either upon the ground that permitting such strangers to act was an act of negligence on the part of the servant in charge,[97] or upon the ground that the act of such stranger was, under the circumstances, to be regarded as the act of the servant in charge, since he was personally present, directing and controlling the act.[98]

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[97] Thus in Leavenworth Elec. R. Co. v. Cusick (1899), 60 Kan. 590, 57 Pac. 519, 72 Am. St. Rep. 374, company was held because street car conductor left car in charge of a friend while he went inside to collect fares and the friend started the car too quickly. In Englehart v. Farrant [1897] 1 Q. B. 240, master was held where driver of his delivery wagon, in disobedience to instructions, left it in charge of the delivery boy, and he carelessly managed it. In Bank of California v. Western Union Tel. Co. (1877), 52 Cal. 280, defendant was held because its agent permitted a stranger to use its lines and equipment, and he sent false messages. In Lakin v. Oregon, etc., R. Co. (1887), 15 Ore. 220, 15 Pac. 641, the injury was caused by the negligence of a learner permitted to handle an engine. In Carson v. Leathers (1880), 57 Miss. 650, the injury was caused by the negligence of a friend of the clerk of a steamboat who permitted his friend to put off and take on passengers. See also Beller v. Levy (1910), 68 N. Y. Misc. 182; Williams v. Koehler (1899), 41 N. Y. App. Div. 426, 58 N. Y. Sup. 863.

In Setterstrom v. Brainard, etc., Ry. Co. (1903), 89 Minn. 262, 94 N. W. 882, it was held that it was a question for the jury whether the servant's abandonment of his post, and putting some one else in, was negligence and the proximate cause of the injury. To the same effect is Vallender v. Victorian Railway Commissioners (1869), 22 Victorian L. R. 141, 18 Australian L. Times, 39.

[98] The chief cases involving this point are the following: Booth v. Mister (1835), 7 C. & P. 66, Wambaugh's Cas. 936 (driver of a cart permitted a friend to drive, and the latter drove negligently); Simons v. Monier (1859), 29 Barb. (N. Y.) 419 (servant clearing land and burning brush had his boy helping him, and the latter set the fire); Althorf v. Wolfe (1860), 22 N. Y. 355 (servant asked friend to help him clear snow and ice off roof, and friend carelessly threw ice on a passer-by; followed in Ellefson v. Singer (1909), 132 N. Y. App. Div. 89, 116 N. Y. Supp. 453; Wooding v. Thom (1911), 148 *id.* 21; Wellman v. Miner (1897), 19 N. Y. Misc. 644, 44 N. Y. Sup. 417); Bamberg v. International Ry. Co (1907), 53 N. Y. Misc. 403 (like Booth v. Mister, *supra*); Appel v. Eaton (1902), 97 Mo. App. 428, 71 S. W. 741 (servant asked friend to move an elevator which was in his way,

§ 514. —— Sub-agents.—The rule of liability extends also to the acts of sub-agents, where they have been so appointed, within the principles already considered,[99] as to make them in law the agents of the principal.[1]

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and in doing so friend injured plaintiff); James v. Muehlebach (1889), 34 Mo. App. 512 (servant asked friend to help him readjust his load and in doing so friend injured plaintiff); Hill v. Sheehan (1892), 20 N. Y. Supp. 529, 48 N. Y. St. R. 410 (servant let a friend drive horse entrusted to servant for delivery to a patron); Hollidge v. Duncan (1908), 199 Mass. 121, 85 N. E. 186, 17 L. R. A. (N. S.) 982 (servant asked a by-stander to assist him in repairing his cart, and by-stander injured plaintiff); Tuller v. Talbot (1860), 23 Ill. 357, 76 Am. Dec. 695 (stage coach driver becoming ill asked a passenger to drive); Harris v. Fiat Motors (1907), 23 Times L. Rep. 504 (servant delivering automobile asked friend to drive while he made some adjustments). See also, Geiss v. Taxicab Co. (1913), 120 Minn. 368, 139 N. W. 611, 45 L. R. A. (N. S.) 382.

In the following cases the master was held not liable for the negligence of the substitute employed by the servant: Mangan v. Foley (1888), 33 Mo. App. 250 (driver of a coal wagon got a friend to haul a load or two for him); Long v. Richmond (1902), 68 N. Y. App. Div. 466, 73 N. Y. Sup. 912, affirmed, 175 N. Y. 495, 57 N. E. 1084 (servant, in violation of express instructions, permitted a friend to ride a horse which the servant was directed to deliver); (see this case distinguished in Bamberg v. International Ry. Co. (1907), 53 Misc. 403); Hills v. Strong (1907), 132 Ill. App. 174 (the driver of wagon asked a friend to perform his duties for an hour or more while the driver attended a hearing in police court); Taylor v. Baltimore, etc., R. Co. (1908), 108 Va. 817 (conductor of a freight train requested a by-stander to assist in the unloading of freight, as "his men were out of place"); Board of Trade Bldg. v. Cralle (1909), 109 Va. 246, 63 S. E. 995, 132 Am. St. Rep. 917, 22 L. R. A. (N. S.) 297 ("hall-boy" employed by defendant, with no authority to operate elevators or to hire operators, requested another boy to run the elevator); Cooper v. Lowery (1908), 4 Ga. App. 120 (a servant employed to deliver guano from a factory hired a boy to help him); White v. Levi (1911), 137 Ga. 269, 73 S. E 376 (to the same effect, where a servant, sent to get an automobile, directed a young boy to drive it and while he was doing so the plaintiff was injured); Thyssen v. Ice & Storage Co. (1907), 134 Iowa 749, 112 N. W. 177, 13 L. R. A. (N. S.) 572 and Note; Levin v. Omaha (1918), 102 Neb. 328, 167 N. W. 214.

[99] See *ante* § 180.

[1] See Arff v. Ins. Co. (1890), 125 N. Y. 57, 25 N. E. 1073, 10

§ 515. —— Wife or child as servant—"Family automobile."—As has been seen, an implied agency does not usually result merely from the existence of domestic relations. The wife is not, *per se*, the agent of her husband,[2] nor is the child *per se*, the agent or servant of the father.[3] Either one may be made so, as where the husband expressly or by implication places his wife in charge, or the father uses his son in his business or his work.[4] Wherever the appointment is so made, the usual consequences result. If not so employed, the father is not responsible for the child's torts.

The most conspicuous extension of this doctrine, in modern times, is in the case of the so-called "family automobile," where the father, in some States, has been made responsible upon a liberal interpretation of a family agency, which regards the common use of the automobile, provided for the family's pleasure and recreation, as an act in the service or agency of the father.[5]

L. R. A. 609; Goode v. Ins. Co. (1895), 92 Va. 392, 23 S. E. 744, 53 Am. St. R. 817, 30 L. R. A. 842; Steele v. Ins. Co. (1892), 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85.

[2] See Benjamin v. Benjamin (1843), 15 Conn. 347, 39 Am. Dec. 384, Mechem's Cas. 72.

[3] See Johnson v. Stone (1860), 40 N. H. 197, 77 Am. Dec. 706, Mechem's Cas. 78; Bennett v. Gillette (1859), 3 Minn. 423, 74 Am. Dec. 774, Mechem's Cas. 79.

[4] See Wright v. Wilcox (1838), 19 Wend. (N. Y.) 343, 32 Am. Dec. 507, Wambaugh's Cas. 118.

[5] See, holding the father liable: Crittenden v. Murphy (1918), 36 Cal. App. 803, 173 Pac. 595; Hutchins v. Haffner (1917), 63 Colo. 365, 167 Pac. 966, L. R. A. 1918A, 1008; Griffin v. Russell (1915), 144 Ga. 275, 87 S. E. 10, L. R. A. 1916F, 216, Ann. Cas. 1917D, 994; Landry v. Oversen (1919), 187 Iowa 284, 174 N. W. 255; Stowe v. Morris (1912), 147 Ky. 386, 144 S. W. 52, 39 L. R. A. (N. S.) 224; Johnson v. Smith (1919), 143 Minn. 350, 173 N. W. 675; Lewis v. Steele (1916), 52 Mont. 300, 157 Pac. 575; Linch v. Dobson (1922), — Neb. —, 188 N. W. 227; Boes v. Howell (1918), 24 N. Mex. 142, 173 Pac. 966, L. R. A. 1918F, 288; Robertson v. Aldridge (1923), — N. Car. —, 116 S. E. 742; McNeal v. McKain (1912), 33 Okla. 449, 126 Pac. 742, 41 L. R. A. (N. S.) 775; Davis v. Littlefield (1913), 97 S. Car. 171, 81 S. E. 487; King v. Smythe (1918), 140 Tenn. 217, 204 S. W. 296, L. R. A. 1918F, 293; Birch v. Abercrombie (1913), 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N. S.) 59; Jones v.

§ 516. —— Undisclosed master.—It is not at all essential in these cases ordinarily, that the existence of the relation of master and servant shall have been known to the person injured at the time of the injury. An undisclosed master or principal is liable like any other.

§ 517. —— Apparent or ostensible master.—It is usually the actual master or principal only who is to be held liable. In the ordinary case of negligent or wilful injury, for example, the fact that a particular person was or was not the master or principal, does not enter into the calculation. One does not ordinarily submit to injury of this sort in reliance upon the liability of an apparent or ostensible principal or master.[6]

Such a question, however, might occasionally arise where the

Cook (1922), 90 W. Va. 710, 111 S. E. 828. But not for negligence of one to whom the child turns the car over to operate: Wilde v. Pearson (1918), 140 Minn. 394, 168 N. W. 582.

Holding, not liable, unless actual agency shown; Erlich v. Heis (1915), 193 Ala. 669, 69 So. 530; Arkin v. Page (1919), 287 Ill. 420, 123 N. E. 30, 5 A. L. R. 216; (compare Braham v. Page (1921), 300 Ill. 40, 132 N. E. 817; Watkins v. Clark (1918), 103 Kan. 629, 176 Pac. 131; Pratt v. Cloutier (1920), 119 Me. 203, 110 Atl. 353, 10 A. L. R. 1434; Myers v. Shipley (1922), 140 Md. 380, 116 Atl. 645, 20 A. L. R. 1460; McGowan v. Longwood (1922), — Mass. —, 136 N. E. 72, 23 A. L. R. 617; Loehr v. Abell (1913), 174 Mich. 590, 140 N. W. 926; Wood v. Clements (1917), 113 Miss. 720, 74 So. 422; Hays v. Hogan (1917), 273 Mo. 1, 200 S. W. 286, L. R. A. 1918C, 715, Ann. Cas. 1918E, 1127; Doran v. Thomsen (1908), 76 N. J. L. 754, 71 Atl. 296, 131 Am. St. R. 677, 19 L. R. A. (N. S.) 335; VanBlaricon v. Dodgson (1917), 220 N. Y. 111, 115 N. E. 443, L. R. A. 1917F, 363; Elms v. Fleck (1919), 100 Ohio 186, 126 N. E. 66; Markle v. Perot (1922), 273 Pa. 4, 116 Atl. 542; McFarlane v. Winters (1916), 47 Utah 598, 155 Pac. 437, L. R. A. 1916D, 618; Blair v. Broadwater (1917), 121 Va. 301, 93 S. E. 632, L. R. A. 1918A, 1011; Crossett v. Goelzer (1922), — Wis. —, 188 N. W. 627.

See 2 Wisconsin Law Review, 123; 71 University of Pennsylvania Law Review, 65.

[6] See Smith v. Bailey [1891], 2 Q. B. 403, (disapproving Stables v. Eley (1825), 1 Car. & P. 614); Shapard v. Hynes (1900), 45 C. C. A. 271, 104 Fed. 449, 52 L. R. A. 675.

responsibility of a particular person could fairly be thought to have been an ingredient in the situation.[7]

§ 518. —— Liability by ratification.—Even though the relation of master and servant or of principal and agent did not exist at the time of the injury, a liability for it might be incurred, as has been already seen,[8] by a subsequent ratification, with knowledge of the facts. The doctrine of ratification, with its attendant consequences, applies to tort cases, as well as to contract cases.[9]

§ 519. II. Act must have been done while in the service.—Even though it be agreed that the relation of principal and agent or master and servant in general existed in the given case, it must also appear that the agent or servant was in the service at the time the act in question was done. One may be, but rarely is, in the service at all times.[10] In most cases, there will be hours or periods when he is not in the service. He may take a day off, and will usually not be in the service at night or on Sundays or holidays. If he works in a store or factory, for example, his service will ordinarily not begin until he arrives there in the morning, and it will ordinarily end when he leaves for the night.[11] At what particular hour or spot the service will begin or end, will depend upon the circumstances of the case. There may also be time out for lunch. There may also be casual withdrawals from the service and re-entry into it, and these may often be at a time or place when the servant or agent was expected to remain in the service.

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[7] See Lloyd v. Grace [1912], App. Cas. 716, Ann. Cas. 1913B, 819, 5 Br. Rul. Cas. 498.

[8] See *ante* § 123.

[9] See Dempsey v. Chambers (1891), 154 Mass. 330, 28 N. E. 279, 26 Am. St. R. 249, 13 L. R. A. 219, Wambaugh's Cas. 1030; Keedy v. Amherst (1915), 222 Mass. 72, 109 N. E. 817.

[10] In Chapman v. Railroad Co. (1865), 33 N. Y. 369, 88 Am. Dec. 392, Wambaugh's Cas. 183, a day laborer employed by the month, testified on the witness stand that if at any time after his day's labor was over he saw anything amiss he was required to give attention to it without any specific instructions.

The mere fact that a number of employees, who owed no duty to be there, and who owed no duty to protect the goods, were present at a fire at night which consumed the defendant's freight house, does not make a railroad company responsible for their negligence in not trying to save plaintiff's goods which were in the freight house. Aldrich v. Railroad Co. (1868), 100 Mass. 31, 97 Am. Dec. 74, 1 Am. Rep. 76, Wambaugh's Cas. 202.

§ 520. —— The servant or agent may at the time be in charge of his principal's property, which has been confided to him for use in the service, for example, the master's horse and cart, or his automobile. It was at one time thought that, though the servant or agent took such horse and cart out of the service for his own purposes, the principal or master would still be liable, because he had confided it to him,[12] but that view has now been entirely repudiated,[13] except in the case of what are termed "dangerous instrumentalities."[14]

Hence if the servant or agent departs from the service, and goes with the horse and cart or the automobile "upon a frolic of his own," and while so engaged commits the injury complained of, his principal or master will not be responsible for it.[15] Equally would he not be, if the servant or agent took it surreptitiously, at night, or on Sunday for his own purposes.[16]

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[11] The question might be different under a workmen's compensation act. See Chandler v. Industrial Commission (1922), — Utah —, 208 Pac. 499.

[12] See Sleath v. Wilson (1839), 9 Car. & P. 607, Wambaugh's Cas. 122.

[13] See Storey v. Ashton (1869), L. R. 4 Q. B. 476, Wambaugh's Cas. 204; Slater v. Thresher Co. (1906), 97 Minn. 305, 107 N. W. 133, 5 L. R. A. (N. S.) 598; Reynolds v. Buck (1905), 127 Iowa 601, 103 N. W. 946; Stewart v. Baruch (1905), 103 N. Y. App. Div. 577, 93 N. Y. Supp. 161; Clark v. Buckmobile (1905), 107 N. Y. App. Div. 120, 94 N. Y. Supp. 771; Smet v. Niles (1916), 175 N. Y. App. Div. 822, 161 N. Y. Supp. 566.

[14] See *post* § 543.

[15] See Joel v. Morison (1834), 6 Car. & P. 501, Wambaugh's Cas. 117; Mitchell v. Crassweller (1853), 13 Com. B. 237, Wambaugh's Cas. 144; Rose v. Balfe (1918), 223 N. Y. 481, 119 N. E. 842, Ann. Cas. 1918D, 238. See, also, Smith, 23 Columbia Law Review, 444.

§ 521. —— **Double motive.**—The servant or agent has not departed from the service merely because he may have at the time a purpose to also do some act for himself.[17] In an English case a servant started out with a horse and gig to do two errands, first to collect a debt owing to his employer, and then to drive on further to see his own physician. Before he had reached the first place, he injured the plaintiff by negligent driving. It was held that his employer was liable. He was then on his master's business.[18] If the injury had occurred after he had left the debtor, and was driving on to see his physician, the employer presumptively would not have been held liable.

The fact that the servant was acting with a double motive at the time does not exonerate either the master or the servant. Even in the case of joint wrongdoers, the person injured may usually compel either one to make compensation for the entire injury.

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[16] See Maddox v. Brown (1880), 71 Me. 432, 36 Am. Rep. 336; Way v. Powers (1884), 57 Vt. 135; Adams v. Cost (1884), 62 Md. 264, 50 Am. Rep. 211; Campbell v. Providence (1869), 9 R. I. 262.

[17] See Phelon v. Stiles (1876), 43 Conn. 426, Wambaugh's Cas. 224, where the servant was hurrying the master's work in order to get through early so that he might then do an errand for himself.

[18] Patten v. Rea (1857), 2 Com. B. (N. S.) 606, Wambaugh's Cas. 157.

Compare Corper Brewing Co. v. Huggins (1900), 96 Ill. App. 144 (master's interest in the act too insignificant to be considered his business); Toadvine v. Sinnett (1919), 104 Kan. 111, 178 Pac. 401; Lloyd v. Railway Co. (1919), 107 Wash. 57, 181 Pac. 29, 6 A. L. R. 307.

If the master loans to the servant, or permits him to use, the master's team or automobile solely for the purposes of the servant, the master would not ordinarily be liable for the servant's negligence in using it; but if the master's business or purposes are being furthered or expedited by such use, he may also be liable: See Snyder v. Erikson (1921), 109 Kan. 314, 198 Pac. 1080 (servant told to take master's car to get his lunch so that he could get back to work earlier); Sina v. Carlson (1913), 120 Minn. 283, 139 N. W. 601.

The same result may follow where master permits the servant to mingle the performance of his

§ 522. —— **Departure or detour.**—The servant or agent has not departed from the service merely because he does not do it in the expected or the directed manner.[19] If a servant is directed to take a load of goods to the station with his master's team, and is expected or even directed to go by a certain street, but goes by some other available street merely because he thinks it shorter, or easier for the team, he may have violated his instructions, but he has not departed from the service; and the master will be responsible for his negligent driving on the chosen street, even though it was clear that this injury could not have occurred if he had gone by the other street.

This would be a *detour* but not a *departure.*

§ 523. —— It would still be a detour, rather than a departure, even though he chose the other street because he wished to do some errand of his own on that street upon the way, like stopping at his own house to leave a parcel, and the like. That part of it which was concerned solely with doing his errand,—running in to his house and out again,—would not be in the service; but the main act of driving and controlling his team would be in the service.[20]

own business with that of the master. Here it has been said that no "nice" inquiry will be made to ascertain which one he was serving at the time of the injury. See Drake v. Laundry Co. (1923), — Va. —, 116 S. E. 668, quoting Shearman & Redfield on Negligence (6th ed.) § 147.

[19] The mere fact that the servant violates instructions as to the time or manner or conditions of doing the work, does not take him out of the service. See Philadelphia, etc., R. Co. v. Derby (1852), 55 U. S. (14 How.) 468, 14 L. Ed. 502, Wambaugh's Cas. 139; Cosgrove v. Ogden (1872), 49 N. Y. 255, 10 Am. Rep. 361; Garretzen v. Duenckel (1872), 50 Mo. 104, 11 Am. Rep. 405; McClung v. Dearborne (1890), 134 Pa. 396, 19 Atl. 698, 19 Am. St. R. 708, 8 L. R. A. 204; Weber v. Lockman (1902), 66 Neb. 469, 92 N. W. 591, 60 L. R. A. 313.

Longer road chosen because it was a better one, Mathewson v. Edison Co. (1919), 232 Mass. 576, 122 N. E. 743.

There are, of course, many cases in which the master would expect and desire the servant to make a detour, *e. g.*, where he found the usual or contemplated road impassable or closed for repairs.

[20] See Ritchie v. Waller (1893), 63 Conn. 155, 28 Atl. 29, 38 Am.

§ 524. —— If, however, in the case put, his house was not upon any available and proper street to the station, but in an entirely opposite direction, and he started in that opposite direction for his own purpose, that would be a departure, and for his negligence while it continued his master would not be liable.[21]

St. R. 361, 27 L. R. A. 161 (driver went longer way home in order on the way to stop at his shoemaker's); Loomis v. Hollister (1903), 75 Conn. 718, 55 Atl. 561 (here, in order to go to post office for his mail); Weber v. Lockman (1902), 66 Neb. 469, 92 N. W. 591, 60 L. R. A. 313 (here, to call on friends); Hayes v. Wilkins (1907), 194 Mass. 223, 80 N. E. 449, 120 Am. St. R. 549, 9 L. R. A. (N. S.) 1033 (here, to go to a pool-room to buy tobacco); Lovejoy v. Campbell (1902), 16 S. Dak. 231, 92 N. W. 24.

[21] See McCarthy v. Timmins (1901) 178 Mass. 378, 59 N. E. 1038, 86 Am. St. R. 490, (driver of public cab having finished his day's work and being directed to take his team and cab to the stable, turned completely away from any road to the stable and went some distance in an opposite direction in order to visit a saloon and get a drink; here he left his team unattended while he went into saloon, and team ran away, injuring plaintiff; master held not liable): Mitchell v. Crassweller (1853), 13 Com. B. 237, Wambaugh's Cas. 144 (driver having finished day's work returned to stable to put up his team; instead of doing so, he started off again without authority or permission to take a sick servant home; in returning he carelessly ran down the plaintiff; master held not liable); Stone v. Hills (1877), 45 Conn. 44, 29 Am. Rep. 635 (servant sent with load of goods to be delivered to one T; when he got there T persuaded him to go four miles further, put the goods into a warehouse, and bring back some freight for T from the freighthouse; while at the railway station driver left team unattended, and it ran away, injuring the plaintiff; master held not liable); Fleischner v. Durgin (1911), 207 Mass. 435, 93 N. E. 801, 33 L. R. A. (N. S.) 79, (servant directed to take automobile to a certain garage less than a mile away, turned off to get lunch, then with a friend drove six miles farther out of his way to do an errand for himself; on starting on his way back he carelessly ran into plaintiff; master held not liable).

Other cases to same effect are Healey v. Cockrill (1918), 133 Ark. 327, 202 S. W. 229, L. R. A. 1918D, 115; Carrier v. Donovan (1914), 88 Conn. 37, 89 Atl. 894; Northrup v. Robinson (1912), 33 R. I. 496, 82 Atl. 392; Colwell v. Bottle Co. (1912), 33 R. I. 531, 82 Atl. 388; Danforth v. Fisher (1908), 75 N. H. 111, 71 Atl. 535, 139 Am. St. R. 670, 21 L. R. A.

At what point the servant resumes the service in such a case is a matter of some dispute. A few cases hold that he is in the service as soon as he starts to return;[22] the weight of authority is that he is not in the service again until he has come back, at least substantially, to the point of departure.[23]

§ 525. —— The question whether the deviation in question was a detour or a departure is usually a question of fact. If the case is so clear either way that only one conclusion can reasonably be reached, the court may decide it; if it is not, it must usually be left to the jury, under appropriate instructions from the court as to the principles which control it.[24]

§ 526. **III. Act done must be a part of, or incident to the service.**—Not only must the relation of master and servant exist, and the servant be in the service at the time, but,—fully as important as these facts,—the particular act, as to which

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(N. S.) 93; Steffen v. McNaughton (1910), 142 Wis. 49, 124 N. W. 1016, 19 Ann. Cas. 1227, 26 L. R. A. (N. S.) 382.

Compare Anderson v. Oil Co. (1917), 73 Fla. 432, 74 So. 975; Schrayer v. Bishop (1918), 92 Conn. 677, 104 Atl. 349; McKiernan v. Lehmaier (1911), 85 Conn. 111, 81 Atl. 969; Luckett v. Reighard (1915), 248 Pa. 24, 93 Atl. 773.

[22] See Barmore v. Railway Co. (1905), 85 Miss. 426, 38 So. 210, 3 Ann. Cas. 594, 70 L. R. A. 627; Missouri, etc., R. Co. v. Edwards (1902), 67 S. W. 891 (Tex. Civ. App.).

Compare Riley v. Oil Co. (1921), 231 N. Y. 301, 132 N. E. 97, 22 A. L. R. 1382), (three judges dissent) the departure here was very brief; Graham v. Henderson (1916), 254 Pa. 137, 98 Atl. 870, criticised in 1 Minn. Law Review, 187; McKiernan v. Lehmaier (1911), 85 Conn. 111, 81 Atl. 969; Samuels v. Dairy Co. (1921), 115 Wash. 343, 197 Pac. 24.

[23] See Mitchell v. Crassweller, *supra;* Brinkman v. Zuckerman (1916), 192 Mich. 624, 159 N. W. 316; Hartnett v. Gryzmish (1914), 218 Mass. 258, 105 N. E. 988; Danforth v. Fisher (1908), 75 N. H. 111, 71 Atl. 535, 139 Am. St. R. 670, 21 L. R. A. (N. S.) 93; Colwell v. Bottle Co. (1912), 33 R. I. 531, 82 Atl. 388; Cannon v. Goodyear Co. (1922), — Utah —, 208 Pac. 519.

[24] See Whatman v. Pearson (1868), L. R. 3 Com. Pl. 422, Wambaugh's Cas. 196; Ritchie v. Waller (1893), 63 Conn. 155, 28 Atl. 29, 38 Am. St. R. 361, 27 L. R. A. 161.

liability of the master is urged, must be a part of or incident to the service. A principal or master is not responsible for every and any act which his acknowledged agent or servant may do, even at the time and place of the service. It is not merely a question of time and place, but also of the relation of the act done to the service contemplated. The driver of a team may be in his seat, and driving the team upon the master's business with his left hand, but if he is at the same time and place shooting his own revolver with his right hand, merely for his own amusement or malice and for no purpose connected with the service, his master will not be liable for that. Neither would the master ordinarily be responsible for the slanderous words which the driver from his seat might direct at his personal enemy. The driver might even use the master's whip at one moment for a purpose connected with the service, and at the next moment for his own personal purposes, making the master liable for the first act but not for the second.

§ 527. IV. Means adopted must be permissible.—The means by which the agent or servant endeavors to perform his agency must also be permissible. An authority to do a given act is not necessarily an authority to do it by *any* means or methods which the agent or servant may see fit to employ. The means or method to be adopted must, until something more appears, be assumed to be the usual, the ordinary, the suitable and appropriate means, of the general sort which human experience and practice have adopted for similar situations. If they are of this sort, if would not be material that the principal or master had not actually contemplated the particular one employed, or even that he had expressly forbidden it. But excessive, outrageous, unusual, fantastic or unforeseeable means would ordinarily be excluded. The merchant who sends his clerk out with monthly bills to present and collect, does not ordinarily contemplate or by implication authorize the resort to legal process,[25] or the employment of physical violence as a means of accomplishing the desired result.

[25] See *post* § 549.

§ 528. —— The principal or master *may*, of course, expressly, or by implication from other circumstances, leave the means and methods to the agent's choice. He may be forewarned, by the nature of his agent's business or his professed methods, that unusual methods may be employed.[26] In such a case a liability for such methods may result.

2. *Liability for Negligent Acts.*

§ 529. In general.—The cases most frequently arising and those, in some respects, most easily dealt with, are those involving what is termed the negligence of the agent or servant. They are the simplest, in this respect, namely that, by the hypothesis, they presuppose rather a lack or an absence of thought or attention or motive, and therefore are distinguishable from those in which it is alleged that the agent or servant acted *willfully, maliciously*, or *intentionally.*

Negligence—the failure to take due care—the omission of proper precautions—is one of the most common of human failings, and the number of cases in which it has been held that the master or principal is responsible for the negligence of his servant or agent, is very great.

§ 530. —— Negligence must have been with respect of an act in scope of employment.—The negligence complained of must have been with reference to an act or matter "within the scope of the authority," in the case of an agent; or "within the course of the employment," in the case of a servant. What the former phrase means has already been explained. Authority to do a certain act is not an authority to do *any* act or *all* acts. If a servant does negligently the very thing he was directed to do, there is usually little question. But if the negligence asserted was not in doing *that* act, but in doing some other act negligently, or in doing some other act at all, there is room for question.

Very few acts can be performed in a vacuum. Human affairs must ordinarily be considered in their surroundings, and with their background of time, place and circumstance. Around each act there may be a penumbra of light and shade. Most acts have their natural incidents, their ordinary concomitants, their necessary accompaniments. Almost all employments, moreover, permit a little "play" or "lee-way" or room for variety or choice as to the particular order, or instant, or manner of doing the work. Often it will be a question of degree.

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[26] As in Caswell v. Cross (1876), 120 Mass. 545, Wambaugh's Cas. 226.

§ 531. —— The question of purpose is not conclusive. Not everything which an agent or servant may do for the purpose of accomplishing the result will thereby be brought within the scope of the employment.

About all that can ordinarily be said is that the servant is acting within the course of his employment when he is doing for the master, either the main act itself, or some other act which can fairly and reasonably be deemed to be an appropriate means of doing the main act, or an ordinary and natural incident or attribute of that act, or a natural, direct and logical result of it. Extravagant, extreme or idiosyncratic means and methods must ordinarily be excluded.

The mere fact of injury is, of course, not enough. There must be negligence of his servant within the course of his employment, to make the master liable.

§ 532. —— **How determined.**—The question whether an act was within the course of the employment, is ordinarily a question of fact. If the facts are not disputed and only one inference can reasonably be drawn from them, the court will ordinarily decide it. If the facts are in dispute, or, though not in dispute, if more than one inference can reasonably be drawn from the undisputed facts, the question becomes usually one to be determined by the jury.

§ 533. —— **Illustrations.**—Some illustrations from the cases will help to make the matter more clear. In a leading case it appeared that ordinary farm-hands who had been set to work in a corn field discovered that cattle from a neighbor-ing field had broken through the fence and were trampling down the corn. Without any specific instructions or the knowledge of their employer, they attempted to drive the cattle out in the ordinary way by hallooing and throwing small missiles at them. It was held that their conduct in attempting to drive the cattle out was an act within the course of their employment, so as to make the master responsible for their negligence in killing one of the animals in their efforts to drive it out.[27] In another, a clerk left in charge of his employer's store, thought he detected a customer in the act of stealing goods from the store. He detained the person, called a policeman, and instituted a search. No goods were found. It was held that protecting the goods left in his charge from thieves and "shoplifters" was so far incidental to his employment, and the means employed so ordinary, that the act was within the course of his employment, and his employer responsible for his mistaken exercise of it.[28] But where a boy employed in a department store merely to move and mark goods and with no duty to watch or protect them, did the same thing, it was held that his employer was not liable.[29]

§ 534. —— So where railroad employees, at work upon the road-bed, but having no occasion as part of their work to start fires and no duty to extinguish any, built a fire at noon, upon the right of way to warm their coffee and negligently left it unextinguished, it was held that this was not within the course of their employment, and the railroad company was not liable for a loss caused by the spreading of this fire to the adjacent premises.[30]

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[27] Evans v. Davidson (1880), 53 Md. 245, 36 Am. Rep. 400, Wambaugh's Cas. 231 [Compare Cantrell v. Colwell (1859), 40 Tenn. (3 Head) 471].

[28] Staples v. Schmid (1893), 18 R. I. 224, 26 Atl. 193, 19 L. R. A. 824, Wambaugh's Cas. 243.

[29] Rigby v. Phillipson Co. (1915), 160 Wis. 228, 151 N. W. 260.

[30] Morier v. Railway Co. (1884), 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793, Wambaugh's Cas. 238.

But if they owed a duty to extinguish fires, no matter who started them, the case might be

And where the employee of a teaming company was engaged in leading his employer's horses from the stables to the watering trough in the yard and back again, and while doing so invited a small boy to ride one of them, and the boy in attempting to do so was injured, it was held that the act of inviting the boy to ride was not within the course of the employment, and the employer was not liable.[81] The court said: "The true test

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different. So held: St. Louis, etc., R. Co. v. Ford (1898), 65 Ark. 96, 45 S. W. 55; Baldwin v. Railway Co. (1909), 96 Miss. 52, 52 So. 358.

Servant having no occasion to use fire in the service: April v. Pretorious, [1906] Transvaal L. Rep. 824; Marlowe v. Bland (1910), 154 N. Car. 140, 69 S. E. 752, 47 L. R. A. (N. S.) 1116.

Fires set by servants smoking: Williams v. Jones (1864), 3 H. & C. 256, 602 (not liable); Palmer v. Forestry Ass'n (1921), 80 N. H. —, 112 Atl. 798, 13 A. L. R. 995 (liable); Jefferson v. Derbyshire Farmers [1921], 2 K. B. 281, 13 A. L. R. 989 (liable). While smoking may not be within the course of the employment, to smoke at the time or place may be negligence in the course of the employment.

See also Whiting-Mead Com. Co. v. Industrial Commission (1918), 178 Cal. 505, 173 Pac. 1105, 5 A. L. R. 1518; Eaton v. Lancaster (1887), 79 Me. 477, 10 Atl. 449.

Authority to use fire but set at improper or forbidden times or place: Bugge v. Brown, 26 Comw. L. R. (Australia) 110, 9 Brit. Rul. Cas. 631; Seybold v. Eisle (1912), 154 Iowa 128, 134 N. W. 578; McDermott v. Ice Co. (1910), 44 Pa. Super. Ct. 445.

[81] Bowler v. O'Connell (1894), 162 Mass. 319, 38 N. E. 498, 44 Am. St. R. 359, 27 L. R. A. 173, Wambaugh's Cas. 248. Same: Raible v. Ice Co. (1909), 134 N. Y. App. Div. 705, 119 N. Y. Supp. 138; Corrigan v. Hunter (1909), 139 Ky. 315, 122 S. W. 131.

Servants employed merely to ride or drive animals or vehicles have ordinarily no implied authority to invite or permit strangers to ride. See Houston, etc., R. Co. v. Bolling (1894), 59 Ark. 395, 27 S. W. 492, 43 Am. St. R. 38, 27 L. R. A. 190; Driscoll v. Scanlan (1896), 165 Mass. 348, 43 N. E. 100, 52 Am. St. R. 523; Schulwitz v. Lumber Co. (1901), 126 Mich. 559, 85 N. W. 1075; Dover v. Mfg. Co. (1911), 157 N. Car. 324, 72 S. E. 1067, 46 L. R. A. (N. S.) 199; Foster, etc., Stone Co. v. Pugh (1905), 115 Tenn. 688, 91 S. W. 199, 112 Am. St. R. 881, 4 L. R. A. (N. S.) 804; Rolfe v. Hewitt (1920), 227 N. Y. 486, 125 N. E. 804, 14 A. L. R. 125. But compare Higbee v. Jackson (1920), 101 Ohio St. 75, 128 N. E. 61, 14 A. L. R. 131. See the elaborate Note in 14 A. L. R.

of liability on the part of the defendants is this. Was the invitation given in the course of doing their work, or for the purpose of accomplishing it? Was this act done for the purpose, or as a means, of doing what the employee was employed to do? If not, then in respect to that act, he was not in the course of the defendants' business."

§ 535. —— In an English case, it appeared that iron rails were to be delivered on a dock for shipment abroad. A stevedore had been employed to take the rails up from the dock, where they were to be unloaded by a carter, and put them into a ship. A cart arrived with rails and the carter began to unload them on one side of the cart. The stevedore's servant asked him to put them off on the other side, apparently to expedite the stevedore's work. On the carter's refusing, the stevedore's servant got onto the cart and began throwing off rails on the other side, and, in doing so, carelessly injured a passerby. Was the stevedore responsible for this act of his servant? It was contended that the stevedore's work did not begin until the rails had been unloaded upon the dock, but a majority of the court held that it was competent for a jury to find that the act of the servant in throwing the rails from the cart was not outside his service.[32] One judge, speaking for the majority,

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See also Kiernan v. Ice Co. (1906), 74 N. J. L. 175, 63 Atl. 998.

Liability is sometimes imposed upon the ground that it was negligence to permit children or inexperienced persons to ride or be upon dangerous things. See Gunderson v. Elevator Co. (1891), 47 Minn. 161, 49 N. W. 694; Wells v. Distillery Co. (1911), 144 Ky. 438, 138 S. W. 282.

Gratuitous Acts—Where a business is being carried on for profit, it would not usually be within the scope of the employment to give away service or goods, or to do the acts involved gratuitously. An express company's agent is not acting within the scope of his employment when he takes in goods, not for carriage at any time, but merely for temporary and gratuitous safe keeping, in this case, the customer's wraps. See American Ry. Express Co. v. Wright (1922), 128 Miss. 593, 91 So. 342, 23 A. L. R. 127, and note.

[32] Burns v. Poulson (1873), L. R. 8 Com. Pl. 563, Wambaugh's Cas. 214.

said: "Can it be said that, in the present case, it would have been unreasonable for a jury to find that the act of the foreman in getting into the cart and throwing the iron down was an act *bona fide* and not unreasonably done in the zealous discharge of his duty to his master, in the course of the business he was employed upon? And, if they were of that opinion, might they not properly find that he was acting within the scope of his employment? I think they might."

How far back might this view be carried? Suppose the stevedore's servant, in a zealous desire to aid the work, had gone to help in loading the cart, and in doing so had injured the plaintiff. Would his master have been responsible?

§ 536. —— In another case, a solicitor's clerk, at the close of the day, finding the office lavatory temporarily out of order, went into the private apartment of his employer to wash his hands in a lavatory there, and in doing so caused injury to another tenant. Nothing in the nature of his work took him there, and the clerks in the office had been expressly denied permission to go to this lavatory, having one of their own. It was held that this act was not within the course of his employment, and that the employer was not liable.[33] The judge who wrote the leading opinion said: "He had no business there at all. In doing that which his employment did not in any way authorize him to do, he negligently left the stop-cock open, and the water escaped and did damage. I think there was nothing in this within the scope of his authority, or incident to the ordinary duties of his employment." Another judge put the non-liability chiefly upon the ground that the clerk was really a trespasser in being where he was.

3. *Liability for Wilful Acts.*

§ 537. In general.—It was formerly said that a master or principal was not liable for the wilful act of his agent or servant.[34] "The dividing line," it was declared in one case, "is the wilfulness of the act."[35] This was upon the ground that the very idea of a wilful act involved the conclusion that the agent or servant did the act on his own account and not for his principal or master; that it was the agent's will and not his principal's which was being carried into effect.

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[33] Stevens v. Woodward (1881), 6 Q. B. Div. 318, Wambaugh's Cas.

§ 538. **Principal or master now liable for many wilful acts.**—It has, however, been thought in more recent times, that this was too narrow a view. It may still be the master's work which is being done, though the servant did it wilfully, *i. e.*, intentionally, purposely.[36] The servant or agent may wilfully choose an inappropriate time to do the master's work, or he may wilfully do it under circumstances which make it harmful to third persons, though those were the circumstances under which it was usually properly done.[37] He may choose to act for his master at that time or under those circumstances because he is willing or desirous that, by doing his master's work at that time—

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[34] See McManus v. Crickett (1806), 1 East 106, Wambaugh's Cas. 102.

[35] See Wright v. Wilcox (1838), 19 Wend (N. Y.) 343, 32 Am. Dec. 507, Wambaugh's Cas. 118. But compare later case in same court, Rounds v. Railroad Co. (1876), 64 N. Y. 129, 21 Am. Rep. 597, Wambaugh's Cas. 218.

[36] See Limpus v. Omnibus Co. (1862), 1 Hurl. & C. 526, Wambaugh's Cas. 170.

[37] This is well illustrated in Nelson Business College Co. v. Lloyd (1899), 60 Ohio St. 448, 54 N. E. 471, 71 Am. St. R. 729, 46 L. R. A. 314, where the janitor in a business college stubbornly and wilfully persisted in doing his regular work in the regular order, even though he saw that doing so would directly and seriously injure a third person. Here the plaintiff, an electric light repairman, who had been called in to repair a light, was standing on a ladder placed upon a table, so as to reach the light. The evidence tended to show that the janitor, being delayed in his work (which involved moving this table) by the time taken to repair the light, became impatient, and demanded that the plaintiff get down; he was told that it would only take a few minutes, but he was unyielding, and violently shoved the table, throwing the plaintiff down.

Compare Stranahan v. Coit (1896), 55 Ohio St. 398, 45 N. E. 634, 4 L. R. A. 506. See also Noland v. Morris (1922), — Mo. App. —, 248 S. W. 627.

otherwise a proper time—he may make it the means of injuring his own enemy; but it is still his master's work.

§ 539. —— When not liable.—If, however, he merely takes advantage of the opportunity or occasion which the master's business affords, to do some act which would never be a proper part of it, or which was not usually or then a proper part of it, merely to give vent to some motive of his own, his master would not be liable.[38]

So, if it could be shown that, upon the occasion in question, the servant or agent acted solely for his own purposes, the principal or master would not be liable. Thus the master is not liable for assaults committed by his servant in his purely personal quarrels.[39]

While the rule upon the general subject was being developed, certain classes of cases which were thought to be more or less exceptional were recognized, which will now be considered.

§ 540. Special cases.—1. Where master or principal owed a special duty.—A principal or master may, at times, be under a *special* duty to third persons. This may be a duty created by contract, or it may be one imposed by law. Where it is created solely by contract and is not performed, an action for breach of the contract will be appropriate. Where it is one imposed by law, and is not performed, the plaintiff may usually make his case by showing the duty, its non-performance, and the resulting injury. Why it was not performed, will usually be a matter of defense. But the one who owed the duty does not usually show a defense merely by offering to prove that the agent or servant to whom he confided the performance of this, his duty, had failed to perform it. It still remains unperformed. And it does not usually *help* the case, though it may *aggravate* it, to show that the reason why the agent or servant did not perform the duty he had undertaken was because he cherished ill-will or some other such personal feeling toward the plaintiff or the defendant.

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[38] Thus, in Evers v. Krouse (1904), 70 N. J. L. 653, 58 Atl. 181, 66 L. R. A. 592, a father directed his minor son to get out the garden hose and sprinkle the lawn. While doing so, the boy, in a spirit of mischief turned the hose off the lawn, and sent a stream of water against a horse standing on the opposite side of the street, causing it to run away and injure the plaintiff. It was held that the father was not liable. "If the act of the defendant's son in throwing water upon the plaintiff's horse was not the result of his careless handling of the garden hose while sprinkling his father's lawn, but was deliberately done by him purely out of a spirit of mischief, for the purpose of frightening the animal, the fact that he used the tool, supplied to him for the doing of his father's work, for the accomplishment of his own mischievous purpose, did not make it an act within the scope of his employment and did not render the defendant liable for the injury resulting therefrom."

[39] See Lynch v. Railroad Co (1901), 113 Ga. 1105, 39 S. E. 411 54 L. R. A. 810.

The characteristic of these cases is that a liability may be based upon the special duty, and not merely upon the law of master and servant. In many cases, under this rule, masters have been held liable for the acts of servants which could not have been deemed to be within the course of the employment.

§ 541. —— What all of these special duties are is not clearly determined. The rule has often been applied to the carrier of passengers. If a railroad company has undertaken to carry a passenger across the Isthmus of Panama with reasonable dispatch, and has entrusted that duty to its servant who has, without excuse, left the passenger stranded midway, it was said to be no defense that the agent did this wilfully.[40] If a railroad company which owes a duty of protection to its passengers, entrusts the performance of this duty to its servants, it is held to be no defense if the servant, instead of protecting the passenger, himself wilfully assaults him.[41]

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[40] See Weed v. Panama R. Co. (1858), 17 N. Y. 362, 72 Am. Dec. 474, Wambaugh's Cas. 162.

[41] See Birmingham, etc., R. Co. v. Baird (1900), 130 Ala. 334, 30 So. 456, 89 Am. St. R. 43, 54 L. R. A. 752; Western, etc., R. Co. v. Turner (1884), 72 Ga. 292, 53 Am. Rep. 842; Chicago, etc., R. Co. v. Flexman (1882), 103 Ill. 546, 42 Am. Rep. 33; Atchison, etc., R. Co. v. Henry (1895), 55 Kan. 715, 41 Pac. 952, 29 L. R. A. 465; Hull v. Railroad Co.

The same doctrine would apply to sleeping-car companies and steamship companies, and, by many authorities, to inn or hotel keepers.[42] Whether other employers owe a special duty to protect their patrons is more or less in dispute.[43]

(1911), 210 Mass. 159, 96 N. E. 58, 36 L. R. A. (N. S.) 406; Ann. Cas. 1912C 1147; Strother v. Railroad Co. (1898), 123 N. Car. 197, 31 S. E. 386; Craker v. Railway Co. (1875) 36 Wis. 657, 17 Am. Rep. 504.

[42] As to inn or hotel keepers, see Lehnen v. Hines (1912), 88 Kan. 58, 127 Pac. 612, 42 L. R. A. (N. S.) 830; Clancy v. Barker (1904), 71 Neb. 83, 98 N. W. 440, 103 N. W. 446, 115 Am. St. R. 559, 8 Ann. Cas. 682, 69 L. R. A. 642; de Wolf v. Ford (1908), 193 N. Y. 397, 86 N. E. 527, 127 Am. St. R. 969, 21 L. R. A. (N. S.) 860.

Contra: Clancy v. Barker (1904), 66 C. C. A. 469, 131 Fed. 161, 69 L. R. A. 653; Rahmel v. Lehndorff (1904), 142 Cal. 681, 76 Pac. 659, 100 Am. St. R. 154, 65 L. R. A. 88; Curtis v. Dineen (1886), 4 Dak. 245, 30 N. W. 148.

[43] Thus, it has been both affirmed and denied that the doctrine applies to ordinary shops, stores, express offices, warehouses, and other similar places of business. See Swinarton v. Le Boutillier (1884), 7 N. Y. Misc. 639, 28 N. Y. Supp. 53, 31 Abb. N. C. 281, 58 N. Y. St. R. 285 (aff'd no opinion, 148 N. Y. 752) (proprietor of store liable); *contra:* Ducre v. Lumber Co. (1911) 168 Mich. 49, 133 N. W. 938; Bowen v. Railroad Co. (1905), 69 C. C. A. 444, 136 Fed. 306, 70 L. R. A. 915; (railroad company not liable to person, not a passenger, who was assaulted by ticket and freight agent); Hudson v. Railway Co. (1876), 16 Kan. 470 (same effect); Fairbanks v. Warehouse Co. (1905), 189 Mass. 419, 75 N. E. 737, 109 Am. St. R. 646, 13 L. R. A. (N. S.) 422 (not liable for assault by elevator man in a storage-warehouse).

Saloon-keeper liable for wilful assault by bar-tender upon a sleeping patron. Curran v. Olson (1903), 88 Minn. 307, 92 N. W. 1124, 97 Am. St. R. 517, 60 L. R. A. 733; Beilke v. Carroll (1909), 51 Wash. 395, 98 Pac. 1119, 130 Am. St. R. 1103, 22 L. R. A. (N. S.) 527; Rommel v. Schambacher (1887), 120 Pa. 579, 11 Atl. 779, 6 Am. St. R. 732.

Contra: Anderson v. Diaz (1906), 77 Ark. 606, 92 S. W. 861, 113 Am. St. R. 180, 4 L. R. A. (N. S.) 649. Compare Bergman v. Hendrickson (1900), 106 Wis. 434, 82 N. W. 304, 80 Am. St. R. 47.

Applied to association holding a fair: Brooks v. Ass'n (1905), 35 Ind. App. 221, 73 N. E. 951. To a society giving a picnic: Mastad v. Swedish Brethren (1901), 83 Minn. 40, 85 N. W. 913, 85 Am. St. R. 446, 53 L. R. A. 803.

§ 542. —— The special duty may be not only in respect of the protection of persons, but also of goods, as in many cases which will at once come to mind.[44]

§ 543. —— 2. Where master confides to servant's use a dangerous instrumentality.—Another special case is often said to be that which arises where the master entrusts to the servant, to be used in the master's business, what is termed a "dangerous instrumentality." Such a situation, it is supposed, may also furnish a ground of liability, independent of the ordinary rules of *respondeat superior*. What these dangerous instrumentalities are, has not been clearly defined. Properly the idea would seem to be confined to such things as are *in themselves* unusually dangerous. In actual operation it sometimes seems to mean anything which may be made dangerous in use. This view robs the rule of all significance. An ordinary stick of fire-wood in the hands of an angry and powerful man may be a dangerous weapon, but it is not inherently a dangerous instrumentality. Poisons, high explosives, spring-guns, and the like, may more reasonably be so considered.[45] Railway locomotives with steam up, out upon the track, have frequently been so designated;[46]

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[44] Where master owed duty to protect, not persons, but property confided to his care: Firemans' Fund Ins. Co. v. Schreiber (1912), 150 Wis. 42, 135 N. W. 507, Ann. Cas. 1913E, 823, 45 L. R. A. (N. S.) 314.

See also McCord v. Telegraph Co. (1888), 39 Minn. 181, 39 N. W. 315, 12 Am. St. R. 636, 1 L. R. A. 143, Goddard's Cas. 765; Schaefer v. Osterbrink (1886), 67 Wis. 495, 30 N. W. 922, 58 Am. Rep. 875; Hogle v. Mfg. Co. (1908), 128 N. Y. App. Div. 403, 199 N. Y. 388, 92 N. E. 794, 32 L. R. A. (N. S.) 1038.

[45] See Loop v. Litchfield (1870), 42 N. Y. 351, 1 Am. Rep. 513; Feeney v. Standard Oil Co. (1922), — Cal. App. —, 209 Pac. 85 (gasoline); Childs v. Standard Oil Co. (1921), 149 Minn. 166, 182 N. W. 1000 (gasoline); Wells v. Gallagher (1905), 144 Ala. 363, 39 So. 747, 113 Am. St. R. 50, 3 L. R. A. (N. S.) 759 (bomb).

[46] See Toledo, etc., R. Co. v. Harmon (1868), 47 Ill. 298, 95 Am. Dec. 489, Wambaugh's Cas. 198; Chicago, etc., R. Co. v. Dickson (1872), 63 Ill. 151, 14 Am. Rep. 114; Billman v. Railroad Co. (1881), 76 Ind. 166, 40 Am. Rep. 230; Alsever v. Railroad Co. (1902), 115 Iowa 338, 88 N. W. 841, 56 L. R. A. 748; Stewart v. Lumber Co. (1907), 146 N. Car.

but not an automobile,[47] a railway hand-car,[48] a horse and cart,[49] or other similar ordinary and familiar things.[50]

Railway signal torpedoes have been held to be dangerous instrumentalities,[51] and even a "railway tricycle."[52]

47, 59 S. E. 545; Skipper v. Mfg. Co. (1900), 58 S. Car. 143, 36 S. E. 509; Nashville, etc., R. Co. v. Starnes (1871), 56 Tenn. (9 Heisk.) 52, 24 Am. Rep. 296; Texas, etc., R. Co. v. Scoville (1894), 10 C. C. A. 479, 62 Fed. 730, 27 L. R. A. 179.

Some of these cases doubtless could be put under the general rule as to wanton or malicious acts *ante* § 538. In some of them the court expressly refers, as in the Scoville case, *supra*, to "these terrible expressions of the powerful and dangerous agency of steam." They are chiefly cases of injuries caused by blowing of whistles (frightening horses) or blowing off steam.

Contra, see Stephenson v. Railway Co. (1892), 93 Cal. 558, 29 Pac. 234, 27 Am. St. R. 223, 15 L. R. A. 475.

[47] See Jones v. Hoge (1907), 47 Wash. 663, 92 Pac. 433, 125 Am. St. R. 915, 14 L. R. A. (N. S.) 216; Steffen v. McNaughton (1910), 142 Wis. 49, 124 N. W. 1016, 19 Ann. Cas. 1227, 26 L. R. A. (N. S.) 382; Slater v. Thresher Co. (1906), 97 Minn. 305, 107 N. W. 133, 5 L. R. A. (N. S.) 598; Danforth v. Fisher (1908), 75 N. H. 111, 71 Atl. 535, 139 Am. St. R. 670, 21 L. R. A. (N. S.) 93; Lotz v. Hanlon (1907), 217 Pa. 339, 66 Atl. 525, 118 Am. St. R. 922, 10 Ann. Cas. 731, 10 L. R. A. (N. S.) 202.

[48] See Branch v. Railroad Co (1898), 92 Tex. 288, 47 S. W. 974, 71 Am. St. R. 844; Daugherty v. Railroad Co. (1908), 137 Iowa 257, 114 N. W. 902, 126 Am. St. R. 282, 14 L. R. A. (N. S.) 590.

[49] Storey v. Ashton (1869), L. R. 4 Q. B. 476, Wambaugh's Cas. 204 *semble;* or a wagon and a team of mules. Dover v. Mfg. Co. (1911), 157 N. Car. 324, 72 S. E. 1067.

[50] See Canton Warehouse Co. v. Pool (1900), 78 Miss. 147, 28 So. 823, 84 Am. St. R. 620.

Not a compressed-air hose: Ballard v. Railroad Co. (1908), 128 Ky. 826, 110 S. W. 296, 16 L. R. A. (N. S.) 1052; Galveston, etc., R. Co. v. Currie (1906), 100 Tex. 136, 96 S. W. 1073, 10 L. R. A. (N. S.) 367; or a garden hose, Evers v. Krouse (1904), 70 N. J. L. 653, 58 Atl. 181, 66 L. R. A. 592.

[51] See Pittsburgh, etc., R. Co. v. Shields (1900), 47 Ohio St. 387, 24 N. E. 658, 21 Am. St. R. 840, 8 L. R. A. 464; Merschel v. Railroad Co. (1905), 121 Ky. 620, 85 S. W. 710, 27 Ky. Law R. 465; Euting v. Railway Co. (1902), 116 Wis. 13, 92 N. W. 358, 96 Am. St. R. 936, 60 L. R. A. 158.

But see Johnson v. Railway Co. (1913), 157 Iowa 738, 141 N. W. 430, L. R. A. 1916F, 945.

[52] See Barmore v. Railway Co. (1904), 85 Miss. 426, 38 So. 210, 3 Ann. Cas. 594, 70 L. R. A. 627.

§ 544. —— What the measure of responsibility is in these cases is also in dispute. Some cases treat it as practically absolute,[53] and so it doubtless would be if the theory were carried to its logical conclusion; but it rarely is. More cases regard it as a situation wherein a high degree of care is required which will make the master liable if the servant to whose care it is confided does not thus care for it, but as not imposing liability if the dangerous thing escapes by reason of the act of a servant who had no authority to use it, or of the wilful or wanton act of the servant to whom it was confided, when he was not using it in the course of his employment.[54] Playing pranks and practical jokes with the thing in question, is a common illustration of the latter sort of use.

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[53] See Pittsburgh, etc., R. Co. v. Shields, *supra;* Merschel v. Railroad Co., *supra;* Cleveland, etc., R. Co. v. Marsh (1900), 63 Ohio St. 236, 58 N. E. 821, 52 L. R. A. 142, cases where railway signal torpedoes, through the acts of servants, fell into the hands of children, who were injured by them. See also Euting v. Railway Co., *supra.*

[54] See Obertoni v. Railroad Co. (1904), 186 Mass. 481, 71 N. E. 980, 67 L. R. A. 422, similar in many respects to foregoing, but reaching an opposite conclusion.

Compare also Sullivan v. Railroad Co. (1903), 115 Ky. 447, 24 Ky. Law R. 2344, 74 S. W. 171, 103 Am. St. R. 330 (practical joke); Goupiel v. Railway Co. (1922), — Vt. —, 118 Atl. 586 (practical joke).

See also (compressed air apparatus used to perpetrate a joke) Galveston, etc., Ry. Co. v. Currie (1906), 100 Tex. 136, 96 S. W. 1073, 10 L. R. A. (N. S.) 367; Ballard v. Railway Co. (1908), 128 Ky. 826, 110 S. W. 296, 16 L. R. A. (N. S.) 1052; (water hose on locomotive used to play a prank); International, etc., R. Co. v. Cooper (1895), 88 Tex. 607, 32 S. W. 517.

In Johnson v. Railway Co. (1913), 157 Iowa 738, 141 N. W. 430, L. R. A. 1916F, 945, cited *supra*, a brakeman used a torpedo around which to wrap a note to the plaintiff, a young lady who lived near the track, and he threw it out for her as he passed. The torpedo with the note attached was brought to the plaintiff by her sister, and she was injured by it. *Held*, that the company was not liable.

Professor Horack, in 26 Yale Law Journal, 224, suggests that "The question which should determine the master's liability should be: Could the master have reasonably looked forward to and have expected such a misuse, as incidental to entrusting this thing to the servant for use in the master's business"; and that the test

§ 545. —— 3. **Where master entrusts to servant performance of duties involving use of force upon others.**—Another class of cases in which the master is said to be under a special duty with its special rule of liability is that in which the master has confided to his servant duties which in the natural and ordinary course may involve the use of force upon third persons, and has expressed or impliedly committed to the servant the determination of the particular occasion upon which such force is to be used and the particular degree of force which is to be applied.[55]

Illustrations of these cases are found in the conductor who is expected to eject passengers who do not pay fare or comply with the carrier's regulations; the brakeman who is expected to put off or keep off tramps and others seeking to ride upon freight trains; the watchman, guard, detective, or private "police man," gate-keeper, ticket-taker, who is expected to keep out trespassers, maintain order upon premises, prevent theft, keep out those who have not tickets, and the like, by the use

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of a dangerous instrumentality should be the likelihood, according to experience, that it will specially tempt a servant to misuse it.

[55] Thus, in Howe v. Newmarch (1866), 94 Mass. (12 Allen) 49, Wambaugh's Cas. 184, the court said: "If the master give an order to a servant which implies the use of force and violence to others, leaving to the discretion of the servant to decide when the occasion arises to which the order applies, and the extent and kind of force to be used, he is liable if the servant, in executing the order, makes use of force in a manner and to a degree which is unjustifiable."

See also Ploof v. Putnam (1909), 83 Vt. 252, 75 Atl. 277, 138 Am. St. R. 1085, 26 L. R. A. (N. S.) 251; New Ellerslie Fishing Club v. Stewart (1906), 123 Ky. 8, 29 Ky. Law R. 414, 93 S. W. 598, 9 L. R. A. (N. S.) 475.

The fact that the master warned against or forbade the use of excessive force or the particular form of it resorted to, will not of itself relieve him from liability. He cannot escape the ordinary consequences merely by forbidding them. See West Jersey, etc., R. Co. v. Welsh (1898), 62 N. J. L. 655, 42 Atl. 736, 72 Am. St. R. 659; Letts v. Hoboken Co. (1904), 70 N. J. L. 358, 57 Atl. 392; Barden v. Felch (1872), 109 Mass. 154; Williams v. Tolbert (1906), 76 S. Car. 211, 56 S. E. 208.

of physical force if necessary.[56] The use of reasonable force may be justified, but the use of excessive force may be actionable.

The same situation will arise where the master directs the servant to do an act in which, as he has reason to expect, there is likely to be resistance, which resistance, nevertheless, he expects the servant to overcome. The case of the agent or servant sent to seize or reclaim property, furnishes a frequent illustration.[57]

§ 546. —— If such an agent or servant negligently uses force upon an improper occasion, or negligently uses excessive force upon a proper occasion, his employer will ordinarily be responsible. So he will be, if the agent or servant merely acts too zealously; or, in the friction aroused by opposition or resistance, and not from any purpose of his own, oversteps the bounds of reason, and applies excessive force.

"If, however," it is said in one case, "the servant, under guise and cover of executing his master's orders and exercising the authority conferred upon him, wilfully and designedly, for the purpose of accomplishing his own independent, malicious or wicked purposes, does an injury to another, then the master is not liable."[58]

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[56] See Southern Ry. Co. v. James (1903), 118 Ga. 340, 45 S. E. 303, 63 L. R. A. 257; Barabasz v. Kabat (1897), 86 Md. 23, 37 Atl. 720; Gray v. Railway Co. (1897), 168 Mass. 20, 46 N. E. 397; Aiken v. Railway Co. (1903), 184 Mass. 269, 68 N. E. 238; Rogahn v. Mfg. Co. (1891), 79 Wis. 573, 48 N. W. 669; Robards v. Sewer Pipe Co. (1908), 130 Ky. 380, 113 S. W. 429, 132 Am. St. R. 394, 18 L. R. A. (N. S.) 923.

[57] See McClung v. Dearborne (1890), 134 Pa. 396, 19 Atl. 698, 19 Am. St. R. 708, 8 L. R. A. 204; Williams v. Tolbert (1906), 76 S. Car. 211, 56 S. E. 908; Levi v. Brooks (1877), 121 Mass. 501; Canton v. Grinnell (1904), 138 Mich. 590, 101 N. W. 811; Zart v. Sewing Mach. Co. (1910), 162 Mich. 387, 127 N. W. 272.

[58] Rounds v. Railway Co. (1876), 64 N. Y. 129, 21 Am. Rep. 597, Wambaugh's Cas. 218.

If a brakeman who had no authority to collect fares throws a trespasser off a moving train, because the trespasser refused to give him a gratuity, not a fare, the company is *held* not liable.

Neither will he be, for force used in an encounter occurring wholly outside of the service, although it grew out of feelings or animosities engendered in the service. Private revenge or punishment for past acts are rarely, if ever, within the course of the employment.[59]

It is sometimes difficult to determine whether the act was a private wrong or an act in the course of the employment.

Ill. Cent. R. Co. v. Latham (1894), 72 Miss. 32, 16 So. 757, Wambaugh's Cas. 250.

If a floor-walker in a department store, in order merely to extort money for himself, knowingly make a false charge of theft against a customer, the proprietor is *held* not liable. Cobb v. Simon (1905), 124 Wis. 467, 102 N. W. 891.

[59] Thus, where a conductor and a passenger during the trip had had an altercation, and after the journey was ended and the conductor off duty, the latter made an assault, the company was held not liable. There was then no duty to protect the former passenger, and the conductor was not in the service. McGilvray v. Street Ry. Co. (1895), 164 Mass. 122, 41 N. E. 116, Wambaugh's Cas. 251. See also Lynch v. Railroad Co. (1901), 113 Ga. 1105, 39 S. E. 411, 54 L. R. A. 810.

So where train men, whose only authority was to eject trespassers, etc., pursued a person off the right of way, charged him with having interfered with the coupling and beat him, the company was held not liable for this assault. Cincinnati, etc., Ry. Co. v. Rue (1911), 142 Ky. 694, 134 S. W. 1144, 34 L. R. A. (N. S.) 200.

But in New Ellerslie Fishing Club v. Stewart (1906), 123 Ky. 8, 93 S. W. 598, 9 L. R. A. (N. S.) 475, the court said: "Where the agent begins a quarrel while acting within the scope of his agency, and immediately follows it up by a violent assault, the principal will be liable, as the law, under the circumstances, will not undertake to say when, in the course of the assault, he ceased to act as agent, and acted upon his own responsibility."

In Robards v. Sewer Pipe Co. (1908), 130 Ky. 380, 113 S. W. 429, 132 Am. St. R. 394, 18 L. R. A. (N. S.) 923, the same court says that the law will not undertake to make "any nice distinctions fixing with precision the line that separates the act of the servant from the act of the individual. When there is doubt, it will be resolved against the master, upon the ground that he set in motion the servant who committed the wrong." It is submitted that the mere fact that there is doubt is not a good reason for not trying to solve it according to the facts if they can be determined.

Where more than one inference can reasonably be drawn, the case is usually for the jury.[60]

§ 547. **Liability in other cases.**—Many cases of *assault* have already been dealt with, and little more needs to be said upon that subject. As has been seen, for assaults not part of or incident to the service, the master is not ordinarily responsible, even though they occurred at the time or place of the service, unless they can be brought within one of the special cases; clearly not for those caused wholly by the private malice or ill-will of the servant.[61]

§ 548. —— **For false imprisonment,** the rule is the same. Bringing about arrest and imprisonment is not a usual incident of employment,[62] but may occasionally be within the course of the employment, as in the case of agents or servants left in charge of goods and who thus endeavor to protect them;[63] of watchmen, gatemen, private policemen, and the like, who are authorized by their employer to give into custody persons who violate regulations; and the like.[64] For errors in the attempted performance of this duty, the master may be responsible. But he is not for those instituted after the transaction is over, or merely for revenge or punishment, or merely to serve the agent's own purposes.[65]

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[60] See Brennan v. Merchant (1903), 205 Pa. 258, 54 Atl. 891.

[61] See Lynch v. Railroad Co. (1901), 113 Ga. 1105, 39 S. E. 411, 54 L. R. A. 810; Brennan v. Merchant (1903), 205 Pa. 258, 54 Atl. 891; Noland v. Morris (1922), — Mo. App. —, 248 S. W. 627.

[62] See Laird v. Farwell (1899), 60 Kan. 512, 57 Pac. 98; Vara v. Construction Co. (1905), 114 La. 261, 38 So. 162; Barabasz v. Kabat (1897), 86 Md. 23, 37 Atl. 720; Mulligan v. Railway Co. (1892), 129 N. Y. 506, 29 N. E. 952, 26 Am. St. R. 539, 14 L. R. A. 791, (no part of a ticket-agent's duty to apprehend persons for passing counterfeit money where it does not concern his own or his principal's immediate protection); Waters v. Anthony (1902), 20 App. Cas. D. C. 124 (fact that principal had urged his employees to use the utmost diligence in the performance of their duties, does not justify one, who had otherwise no authority or duty, in causing an arrest for a theft from his principal).

[63] See Staples v. Schmid (1893), 18 R. I. 224, 26 Atl. 193, 19 L. R. A. 824, Wambaugh's Cas. 243.

Compare Rigby v. Phillipson Co. (1915), 160 Wis 228. 151 N. W. 260.

[64] See Eichengreen v. Railroad Co. (1895), 96 Tenn. 229, 34 S. W. 219, 54 Am. St. R. 833, 31 L. R. A. 702 (private detective);

§ 549. —— For malicious prosecution, the rule is not otherwise. Most agents and servants have no authority, either express or implied, to institute actions or prosecutions in court. If such an authority be given, the principal or master may be liable for its misuse or abuse, even though he intended justifiable and proper ones only to be instituted.[66] But he is not liable for prosecutions originating in the agent's or servant's own purposes only,[67] or for those for which the service furnishes merely the opportunity to the agent to give vent to his own personal malice or ill will. Clearly, also, in the ordinary case, he is not liable for prosecutions instituted after the transaction is ended, and merely for revenge, or even to bring an alleged

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Johnston v. Railway Co. (1907), 130 Wis. 492, 110 N. W. 424 (watchman); Palmeri v. Railroad Co. (1892), 133 N. Y. 261, 30 N. E. 1001, 28 Am. St. R. 632, 16 L. R. A. 136 (ticket agent); Atchison, etc., R. Co. v. Henry (1895), 55 Kan. 715, 41 Pac. 952, 29 L. R. A. 465 (conductor).

Where defendant put a claim into the hands of a collection agency for collection, being advised by its circulars that it often proceeded against debtors "with such severity as to show that no trifling is intended," and gave no instructions as to the method to be employed in this case, he was held liable for an unjustified arrest of the debtor. Caswell v. Cross (1876), 120 Mass. 545, Wambaugh's Cas. 226.

[65] See Markley v. Snow (1904), 207 Pa. 447, 56 Atl. 999, 64 L. R. A. 685; Govaski v. Downey (1894), 100 Mich. 429, 59 N. W. 167; Singer Mfg. Co. v. Hancock (1897), 74 Ill. App. 556, (aff'd 174 Ill. 503, 51 N. E. 820); Larson v. Association (1898), 71 Minn. 101, 73 N. W. 711.

[66] See Ruth v. Transit Co. (1902), 98 Mo. App. 1, 71 S. W. 1055; Dwyer v. Transit Co. (1904), 108 Mo. App. 152, 83 S. W. 303; Stubbs v. Mulholland (1901), 168 Mo. 47, 67 S. W. 650; Hussey v. Railway Co. (1887), 98 N. Car. 34, 3 S. E. 923, 2 Am. St. R. 312.

Compare Carter v. Machine Co. (1878), 51 Md. 290, 34 Am. Rep. 311; Tolchester Co. v. Steinmeier (1890), 72 Md. 313, 20 Atl. 188, 8 L. R. A. 846; Gillet v. Railroad Co. (1874), 55 Mo. 315, 17 Am. Rep. 653.

[67] See Larson v. Association, *supra*.

offender to justice.[68] By that time any implied authority is usually exhausted.

§ 550. —— **For slander and libel:** The occasions upon which the utterance of oral slanderous words may be found within the course of the employment are not numerous, and it has been said that "there can be no agency in slander."[69] But in a number of cases, corporations have been held liable for slander by agents or servants.[70]

The cases in which principals, corporate and otherwise, have been held liable for libels published by their agents are much more numerous, and it is much easier to see how such an act can be within the course of the employment, as, for example, where a publisher confides the general management of his newspaper to an agent and the latter causes or permits libelous matter to be published in the course of the business.[71] But even where the principal's business is not that of a publisher there are many cases in which the writing and publishing, by agents, through letters, reports, and other means, of matter found to be libelous, was held to be within the course of the employment.[72]

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[68] See Allen v. Railway Co. (1870), L. R. 6 Q. B. 65; Daniel v. Railroad Co. (1904), 136 N. C. 517, 48 S. E. 816, 1 Ann. Cas. 718, 67 L. R. A. 455; Markley v. Snow, *supra*.

[69] See Behre v. Cash Reg. Co. (1897), 100 Ga. 213, 27 S. E. 986, 62 Am. St. R. 320; Singer Mfg. Co. v. Taylor (1907), 150 Ala. 574, 43 So. 210, 124 Am. St. R. 90, 9 L. R. A. (N. S.) 929, and Note; Lindsey v. Railway Co. (1910), 95 Ark. 534, 129 S. W. 807.

[70] See Hypes v. Railway Co. (1908), 82 S. Car. 315, 64 S. E. 395, 17 Ann. Cas. 620, 21 L. R. A. (N. S.), 873; Empire Cream Co. v. Dairy Co. (1907), 75 N. J. L. 207, 67 Atl. 711; Sawyer v. Railroad Co. (1906), 142 N. Car. 1, 54 S. E. 793, 115 Am. St. R. 716, 9 Ann. Cas. 440; May v. Traction Co. (1910), 127 La. 420, 53 So. 671, 32 L. R. A. (N. S.) 206.

[71] See Detroit Post Co. v. McArthur (1868), 16 Mich. 447; Storey v. Wallace (1871), 60 Ill. 51; Dunn v. Hearst (1903), 139 Cal. 239, 73 Pac. 138; Williams v. Fuller (1903), 68 Neb. 354, 94 N. W. 118, 97 N. W. 246.

[72] See Fraternal Alliance v. Mallalieu (1898), 87 Md. 97, 39 Atl. 93; Minter v. Bradstreet (1903), 174 Mo. 444, 73 S. W. 668; Fogg v. Railroad Co. (1889), 148 Mass. 513, 20 N. E. 109, 12 Am. St. R. 583; Hardoncourt v. Iron Co. (1909), 225 Pa. 379, 74 Atl. 243;

Here, however, as elsewhere that act must have been within the scope of that agent's authority,[73] and must not have been inspired merely by the agent's personal malice or ill will.[74]

§ 551. —— **Shooting.**—The use of fire arms is not often within the course of the employment, but it may be, as where guards, watchmen, detectives or private policemen are equipped with, or expected upon possible occasions to use, weapons of this sort for the purpose of guarding goods or premises, or of apprehending or resisting wrong-doers. In such cases, liability of the employer may result under the ordinary rules from careless or reckless or wanton use of these weapons in the course of the employment,[75] but not for shooting when the danger or event which might have justified it was all over.[76]

It might also result from the theory of dangerous instrumentalities if the weapons be regarded as such; from the doctrine respecting the authorized use of force; and, at times, as in the case of the carrier of passengers, from a violation of a duty to protect.

Washington Gas L. Co. v. Lansden (1898), 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543.

[73] See Willner v. Silverman (1909), 109 Md. 341, 71 Atl. 962, 24 L. R. A. (N. S.) 895.

[74] See Washington Gas L. Co. v. Lansden, *supra*.

[75] See Conchin v. Railroad Co. (1910), 13 Ariz. 259, 108 Pac. 260, 28 L. R. A. (N. S.) 88; Southern Ry. Co. v. James (1903), 118 Ga. 340, 45 S. E. 303, 63 L. R. A. 257; Robards v. Sewer Pipe Co. (1908), 130 Ky. 380, 113 S. W. 429, 18 L. R. A. (N. S.) 923; Deck v. Railroad Co. (1905), 100 Md. 168, 96 Atl. 650, 108 Am. St. R. 399; Haehl v. Railway Co. (1893), 119 Mo. 325, 24 S. W. 737; Letts v. Railway Co. (1904), 70 N. J. L. 358, 57 Atl. 392; Magar v. Hammond (1906), 183 N. Y. 387, 76 N. E. 474, 3 L. R. A. (N. S.) 1038; Texas, etc., R. Co. v. Parsons (1908), 102 Tex. 157, 113 S. W. 914, 132 Am. St. R. 857.

See also St. Louis, etc., Ry. Co. v. Hackett (1894), 58 Ark. 381, 24 S. W. 881, 41 Am. St. R. 105.

[76] As where he shoots a retreating trespasser, Golden v. Newbrand (1879), 52 Iowa 59, 2 N. W. 537, 35 Am. Rep. 257; or pursues and shoots after he had left the premises, Lytle v. Hotel Co. (1902), 27 Tex. Civ. App. 530, 66 S. W. 240.

See also Jones v. Railroad Co. (1909), 150 N. Car. 473; Holler v. Ross (1902), 68 N. J. L. 324, 53 Atl. 472, 96 Am. St. R. 546, 59 L. R. A. 943.

Beyond these cases, there would ordinarily be no liability for the wholly disconnected, unexpected, unauthorized, and casual possession and use of fire-arms;[77] nor for their use in the purely personal quarrels or revenges of a servant authorized to use them only in the course of the service.[78]

4. *Liability for Agent's Fraudulent Acts and Representations.*

§ 552. What here involved.—The question here is not the liability for mere negligent or mistaken acts or statements, but for those which are in law deemed to be *fraudulent.* With respect of acts, it is the tricky act, the cheating act, the fraudulently deceptive or misleading act. With respect of representations, it is the representation, made to induce and inducing action, but known to be untrue, or made recklessly without knowledge of its truth or falsity, or made positively and without qualification, and which was in fact untrue.

§ 553. Principal responsible for fraudulent acts in course of employment.—The principal is responsible for the fraudulent acts of his agent done within the scope of his authority. As has been said in a leading case, "no sensible distinction can be drawn between the case of fraud and the case of any other wrong."[79]

If the agent authorized, for example, to manage a business, to buy or sell property, or make other contracts, in the course and as a part of the thing authorized, does fraudulent acts—if he uses sharp practice to conceal defects; if he knowingly points out false boundaries, substitutes other goods for those agreed upon, gives false weights, false measure, false change; if he fraudulently reissues, as still valid, retired and satisfied securities; if he knowingly makes false entries, alters securities, and the like, his principal will ordinarily be responsible.[80] Here there is a fraudulent act in the agent, for which he would himself ordinarily be responsible, and which the law imputes to his principal.

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[77] See Turley v. Railroad Co. (1900), 70 N. H. 348, 47 Atl. 261, (where the servant had no duty to drive off trespassers).

Bowen v. Railroad Co. (1905), 69 C. C. A. 444, 136 Fed. 306, 70 L. R. A. 915 (where the shooting apparently had no connection with the work).

[78] See Berryman v. Railroad Co. (1910), 228 Pa. 621, 77 Atl. 1011, 30 L. R. A. (N. S.) 1049.

[79] Barwick v. Bank (1867), L. R. 2 Exch. 259, Wambaugh's Cas. 412.

§ 554. —— When not liable.—Just as clearly, on the other hand, will the principal not be responsible where the agent was not purporting to act for him, but for himself or for some other principal; or where the act complained of was not one, the doing of which can fairly be regarded as a part or incident of the act authorized, and therefore not within the scope of the authority. Clearly, also, where he was not defendant's agent in that transaction at all.[81]

§ 555. Principal responsible for fraudulent representations within the scope of the authority.—The principal is responsible not only for fraudulent *acts*, but also for fraudulent *repre-*

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[80] See McKinnon v. Vollmar (1889), 75 Wis. 82, 43 N. W. 800, 17 Am. St. R. 178, 6 L. R. A. 121 (pointing out false boundaries); Hollingsworth v. Holbrook (1890), 80 Iowa 151, 45 N. W. 561, 20 Am. St. R. 411 (making alterations in securities); Fifth Ave. Bank v. Railroad Co. (1893), 137 N. Y. 231, 33 N. E. 378, 33 Am. St. R. 712, 19 L. R. A. 331 (issuing false and fictitious certificates of stock); Birkett v. Cable Co. (1905), 107 N. Y. App. Div. 115, 94 N. Y. Supp. 918, aff'd (186 N. Y. 591, 79 N. E. 1101, Goddard's Cas. 761 (overcharging for messages); Mackay v. Commercial Bank (1874), L. R. 5 P. C. 394, Goddard's Cas. 763 (sending false message); McCord v. W. U. Telegraph Co. (1888), 39 Minn. 181, 39 N. W. 315, 12 Am. St. R. 636, 1 L. R. A. 143, Goddard's Cas. 765 (same).

Locke v. Stearns (1840), 1 Metc. (Mass.) 560, 35 Am. Dec. 382 (falsely selling one article for another); Strang v. Bradner (1884), 114 U. S. 555, 5 Sup. Ct. 1034, 29 L. Ed. 248, a partnership case (issuing securities which he pretended had been withdrawn and for which he therefore had obtained others in their stead); Jenkins v. Helms (1922), — Okla. —, 213 Pac. 322 (much like preceding case in principle). The fraudulent bills of lading cases (*ante* § 243) might perhaps be included here. See *Ferson*, 21 Michigan Law Review, 655.

[81] See Thorne v. Heard, [1895] App. Cas. 495; Stimpson v. Achorn (1893), 158 Mass. 342, 33 N. E. 518.

sentations,[82] if made within the scope of the authority. If the agent is expressly authorized to make representations or give information, or if he is put into a position where that is a natural and ordinary attribute, or if he is authorized to do an act which naturally and ordinarily involves giving information, answering inquiries, or making representations as a basis for doing the act contemplated, the principal—although he may have contemplated and expected that only true and proper representations shall be made,—will be responsible for false and fraudulent ones made by the agent while so acting and with reference to the thing authorized.[83] (It will be observed that what is here being considered is not representations made a term in or part of a contract, like a warranty, but false representations made to induce action or inaction.) The fact that the principal was innocent would not be a defense.

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[82] Many attempts have been made to state what is meant by this. "Where a party represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or not and it is actually untrue, he is guilty of falsehood, even if he believes it to be true, and if the statement is thus made with the intention that it shall be acted upon by another, who does so act upon it to his injury, the result is actionable fraud": Hadcock v. Osmer (1897), 153 N. Y. 604, 47 N. E. 923. See also Korentze v. Kennedy (1895), 147 N. Y. 124, 41 N. E. 414, 49 Am. St. R. 651, 29 L. R. A. 360.

"Where a person states of his own knowledge material facts which are susceptible of knowledge, and the statement is made with an intent that another party should act upon it, or in such a manner as would naturally induce him to act upon it, the statement so made, if false, is fraudulent both in morals and law": Atlas Shoe Co. v. Bechard (1906), 102 Me. 197, 66 Atl. 90, 10 L. R. A. (N. S.) 245.

"An unqualified statement that a fact exists, made for the purpose of inducing another to act upon it, implies that the person who makes it knows it to exist, and speaks from his own knowledge. If the fact does not exist, and the defendant states of his own knowledge that it does, and induces another to act upon his statement, the law will impute to him a fraudulent purpose." Kirkpatrick v. Reeves (1889), 121 Ind. 280, 22 N. E. 139.

"If a statement of a fact which is susceptible of actual knowledge is made as of one's own knowledge, and is false, it may be made a foundation of an action for deceit without further proof of an actual intent to deceive." Weeks v. Currier (1898), 172 Mass. 53, 51 N. E. 416.

[83] See Law v. Grant (1875), 37 Wis. 548; Weeks v. Currier, *supra;* Bennett v. Judson (1860), 21 N. Y. 238; Rhoda v. Annis (1883), 75 Me. 17, 46 Am. Rep.

§ 556. —— When not liable.—If, on the other hand, the agent had no express or implied authority to make any representation at all, or none concerning such matters as those in question,[84] or if the representation was made while the agent was not acting as such, or before his authority began, or after the transaction was ended, the principal will ordinarily not be responsible.

§ 557. Apparent agency.—Inasmuch as fraud or false representation is usually a concomitant of contractual dealings to a greater extent than most other torts, there is more room here for the operation of inducements and appearances. Hence if an agent, who was ostensibly and apparently acting for his principal and was dealt with only on that basis, had secretly determined in that transaction to secure the benefit for himself and defraud both the customer and the principal, the principal may nevertheless be liable to the customer.[85]

354; Wolfe v. Pugh (1884), 101 Ind. 293.

False and fraudulent representations made by an agent, whether general or special, employed to sell land will render the principal liable in an action of tort for deceit, although the principal did not in fact authorize them or know of them until after the conveyance. Haskell v. Starbird (1890), 152 Mass. 117, 25 N. E. 14, 23 Am. St. R. 809.

Principal liable for false representations of agent authorized to sell a house, made during the sale: De Camp v. Graupner (1923), — Ark. —, 249 S. W. 6 (but not for representations made before the agency unless subsequently ratified with knowledge).

Actual intent to defraud not essential in Wisconsin: Matteson v. Rice (1903), 116 Wis. 328, 92 N. W. 1109; Davis v. Nuzum (1888), 72 Wis. 439, 40 N. W. 497, 1 L. R. A. 774.

[84] See Hoyer v. Ludington (1898), 100 Wis. 441, 76 N. W. 348, Goddard's Cas. 775; Latham v. Bank (1909), 92 Ark. 315, 122 S. W. 992.

[85] See Lloyd v. Grace, [1912] App. Cas. 716, Ann. Cas. 1913B, 819.

§ 558. Ratification.—The doctrine of ratification, already discussed,[86] is frequently applied here to hold responsible a principal who, with knowledge of the facts, has voluntarily taken the fruits of a fraudulent act, and is therefore held responsible for the fraudulent methods by which they were secured, even though those methods might not otherwise have been deemed to be within the scope of the authority.[87]

§ 559. Form of remedy.—The ordinary common-law action for fraudulent representations is the action of deceit. Equity may rescind acts for fraud, and will sometimes do so for untrue representations which would not sustain an action for deceit. The fraud may also often be shown as a defense to an action upon a contract affected by it. In these respects, there is usually nothing peculiar to the law of agency.[88]

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[86] See *ante* §§ 138, 148.

[87] See Mayer v. Dean (1889), 115 N. Y. 556, 22 N. E. 261, 5 L. R. A. 540; Fairchild v. McMahon (1893), 139 N. Y. 290, 34 N. E. 779, 36 Am. St. R. 701; Meyerhoff v. Daniels (1896), 173 Pa. St. 555, 34 Atl. 298, 51 Am. St. Rep. 782; Baltimore Trust Co. v. Hambleton (1896), 84 Md. 456, 36 Atl. 597, 40 L. R. A. 216; Kilpatrick v. Haley (1895), 13 C. C. A. 480, 66 Fed. 133.

[88] The most difficult question which agency raises is that involved in Cornfoot v. Fowke (1840), 6 M. & W. 358, Wambaugh's Cas. 358, namely, where the agent makes a misrepresentation believing it to be true, but the principal knows it to be untrue though he neither authorized nor expected the representation to be made. If the agent were guilty of fraud, his fraud could be imputed to the principal; but if the agent were innocent, the case is not easy. In Mayer v. Dean (1889), 115 N. Y. 556, 22 N. E. 261, 5 L. R. A. 540, it is said that the knowledge of either could be imputed to the other.

See Pollock on Torts (8th ed.) p. 303. If the principal intended a fraud, he could be held though he used an innocent agent: Diel v. Kellogg (1910), 163 Mich. 162, 128 N. W. 420.

In some States, deceit can not be maintained against an innocent principal (though there might be rescission). See Kennedy v. McKay (1881), 43 N. J. L. 288, 39 Am. Rep. 581; Keen v. James (1885), 39 N. J. Eq. 527, 51 Am. Rep. 29; Keefe v. Sholl (1897), 181 Pa. 90, 37 Atl. 116.

But usually the agent's fraud is imputed to the principal. See Wolfe v. Pugh (1884), 101 Ind. 293; Campbell v. Park (1904), 128 Iowa 181, 101 N. W. 861, 104

5. *Liability for Criminal or Penal Acts of Agent.*

§ 560. **Principal's civil liability for agent's criminal or penal acts.**—The principal may often be held liable in a *civil* action for the criminal or penal act of his agent or servant committed within the course of his employment.[89] Thus the agent may be prosecuted for assault and battery, and the principal may be held liable in damages to the person injured, as the result of the same act, where that act, *e. g.*, an assault by a conductor upon a passenger, was an act for which the master was liable.

But the principal or master could not be held even civilly liable unless the act in question were an act within the course of the employment, that is to say, he is not liable for the personal crimes of his servant or agent not constituting acts within the course of the employment,[90] unless the principal or master can be charged with some dereliction of his own, as by knowingly or negligently employing an improper servant, and the like.

§ 561. —— **Statutory torts.**—A variety of acts have been forbidden by statute under various forms of penalty other than fine or imprisonment. The penalty may be double damages, or the forfeiture of some right, or loss of some interest. Statutes imposing a penalty for usury afford an illustration. If I put money into the hands of an agent to be loaned at lawful rates,

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N. W. 799; Rhoda v. Annis (1883), 75 Me. 17, 46 Am. Rep. 354; Peebles v. Guano Co. (1877), 77 N. Car. 233, 24 Am. Rep. 447.

[89] See Dyer v. Munday [1895], 1 Q. B. 742; George v. Gobey (1880), 128 Mass. 289, 35 Am. Rep. 376.

[90] Master not liable for thefts, forgeries, etc., of his servants not in the scope of the employment, nor the direct, natural and to be expected results of it, nor ratified by the master: Searle v. Parke (1895), 68 N. H. 311, 34 Atl. 744 (employees of decorator stole a ring in the house in which they were at work); Merchants Nat. Bank v. Guilmartin (1892), 88 Ga. 797, 15 S. E. 831, 17 L. R. A. 322 (theft by cashier of special deposits); Fay v. Slaughter (1901), 194 Ill. 157, 62 N. E. 592, 88 Am. St. R. 148, 56 L. R. A. 564 (forgery and theft).

and he exacts usurious interest, can the penalty be visited upon me? Yes, if I authorized it, before hand, or, subsequently, with knowledge of the facts, did what amounted to a ratification.[91] But if I neither authorized nor ratified? Some courts hold it to be like any other wrongful acts done as part of or incident to the act authorized, and therefore making the principal responsible.[92] Others, doubtless a majority, hold the contrary.[93]

§ 562. **Principal's criminal or penal liability for agent's criminal or penal acts.**—The principal will not ordinarily be held *criminally* responsible for the *crimes* of his agent or serv-

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[91] It has been difficult in many cases to find the necessary conditions of ratification (see *ante* § 134), and especially that the act of demanding the extra interest was done *as agent* for the principal; the agent usually demands it for himself. See Condit v. Baldwin (1860), 21 N. Y. 219, 78 Am. Dec. 137; Acheson v. Chase (1881), 28 Minn. 211, 9 N. W. 734; Hall v. Maudlin (1894), 58 Minn. 137, 59 N. W. 985, 49 Am. St. R. 492; Franzen v. Hammond (1908), 136 Wis. 239, 116 N. W. 169, 128 Am. St. R. 1079, 19 L. R. A. (N. S.) 399.

If the agent's exactions and the principal's interest are all included in one security, and the principal with actual or constructive notice, accepts and seeks to enforce it, that would ordinarily amount to a ratification. See Bliven v. Lydecker (1891), 130 N. Y. 102, 28 N. E. 625; Schwarz v. Sweitzer (1911), 202 N. Y. 8, 94 N. E. 1090; Stephens v. Olson (1895), 62 Minn. 295, 64 N. W. 898; McNeely v. Ford (1897), 103 Iowa 508, 72 N. W. 672, 64 Am. St. R. 195.

[92] See Cheney v. White (1876), 5 Neb. 261, 25 Am. Rep. 487; Hare v. Winterer (1910), 64 Neb. 551, 90 N. W. 544.

[93] See Rogers v. Buckingham (1865), 33 Conn. 81; McLean v. Camak (1895), 97 Ga. 804, 25 S. E. 493; Mass. Mut. L. Ins. Co. v. Boggs (1887), 121 Ill. 119, 13 N. E. 550; Richards v. Purdy (1894), 90 Iowa 502, 58 N. W. 886, 48 Am. St. R. 458; Acheson v. Chase (1881), 28 Minn. 211, 9 N. W. 734; Muir v. Savings Institution (1863), 16 N. J. Eq. 537; Condit v. Baldwin, *supra;* Barger v. Taylor (1895), 30 Oreg. 228, 42 Pac. 615, 47 Pac. 618; Williams v. Bryan (1887), 68 Tex. 593, 5 S. W. 401; Baxter v. Buck (1838), 10 Vt. 548; Franzen v. Hammond, *supra.*

See extended Note, in 21 A. L. R. 854, *et seq.*

Some courts have distinguished between general and special agents, holding the principal rather in the former case.

In Robinson v. Blaker (1902), 85 Minn. 242, 88 N. W. 845, 89 Am. St. R. 541, the court made ant, unless he has in some way directed, participated in, or approved the act.[94]

But there is a large class of cases in which acts, previously innocent or at least indifferent, and not generally regarded as crimes, have, by statute, been prohibited under a penalty of some sort, usually a fine, and often imprisonment.

The sale of intoxicating liquors, either at all, or only under certain restrictions, such as forbidding sales to minors, Indians, drunkards, etc., keeping open on Sundays or holidays, and the like, is one of the most conspicuous illustrations of this sort of act.[95] Adulterating food, publishing libels, polluting streams, blasting without prescribed precautions, and a great variety of undertakings forbidden when not licensed, are other illustrations.[96]

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the opposite distinction, holding the principal where he committed certain of the details of a particular loan to his agent.

[94] See Rex v. Huggins (1731), 2 Strange 883, 93 Eng. Reports, Reprint, 915.

[95] See Commonwealth v. Nichols (1845), 10 Metc. (Mass.) 259, 43 Am. Dec. 432, Wambaugh's Cas. 435; Commonwealth v. Stevens (1891), 153 Mass. 421, 26 N. E. 992, 25 Am. St. R. 647, 11 L. R. A. 357; Commonwealth v. Briant (1886), 142 Mass. 463, 8 N. E. 338, 56 Am. Rep. 707, Wambaugh's Cas. 445; Commonw. v. Joslin (1893), 158 Mass. 482, 33 N. E. 653, 21 L. R. A. 449; People v. Roby (1884), 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270; State v. McCance (1892), 110 Mo. 398, 19 S. W. 648; State v. Kittelle (1892), 110 N. Car. 560, 15 S. E. 103, 28 Am. St. R. 698, 15 L. R. A. 694; Anderson v. State (1872), 22 Ohio St. 305.

[96] See Rex v. Almon (1770), 5 Burr. 2686, Wambaugh's Cas. 429 (publishing libel); Rex v. Medley (1834), 6 Car. & P. 292, Wambaugh's Cas. 432 (polluting stream); Commonwealth v. Morgan (1871), 107 Mass. 199, Wambaugh's Cas. 439 (publishing libel); State v. Armstrong (1891), 106 Mo. 395, 16 S. W. 604, 27 Am. St. R. 361, 13 L. R. A. 419 (publishing libel); State v. Smith (1872), 10 R. I. 258 (selling adulterated milk); Hall v. Railroad Co. (1897), 44 W. Va. 36, 28 S. E. 754, 67 Am. St. R. 757, 41 L. R. A. 669 (charging excessive fare); People v. Sheffield Farms Co. (1918), 225 N. Y. 25, 121 N. E. 474 (employing child under age). Here the court said:

"At the outset, therefore, we turn to the Labor Law itself. Section 162 is directed primarily against the employer, and only secondarily against others as they may aid and abet him. People v.

§ 563. —— Much will depend in these cases upon the language of the statute forbidding the act, but in a wide variety of cases principals or masters who were not themselves at fault have been held liable for violations of the statute by the agents or servants employed in carrying on the enterprise in which the violation occurred. But there are also many cases holding them not liable for such acts committed without their knowledge and against their commands.

6. *Procedural Matters.*

§ 564. **Joinder of principal and agent in one action.**—As has been seen, the agent or servant is usually liable for his own torts. In many cases the law imputes a liability to the

Taylor, 192 N. Y. 398, 400, 85 N. E. 759. He must neither create nor suffer in his business the prohibited conditions. The command is addressed to him. Since the duty is his, he may not escape it by delegating it to others. People v. Taylor, *supra*. He breaks the command of the statute if he employs the child himself. He breaks it equally if the child is employed by agents to whom he has delegated 'his own power to prevent.' Lord Alverstone, C. J., in Strutt v. Clifts, [1911] 1 K. B. 1, 6, 7, and Emary v. Nolloth, [1903] 2 K. B. 264. What is true of employment, must be true of the sufferance of employment. Bond v. Evans, L. R. 21 Q. B. D. 249. The personal duty rests on the employer to inquire into the conditions prevailing in his business. He does not rid himself of that duty because the extent of the business may preclude his personal supervision, and compel reliance on subordinates. He must then stand or fall with those whom he selects to act for him. He is in the same plight, if they are delinquent, as if he had failed to abate a nuisance on his land (R. v. Stephen, L. R. 1 Q. B. 702; Tenement House Department v. McDevitt, 215 N. Y. 160, 167, 168, 109 N. E. 88, Ann. Cas. 1917A, 455), or had failed to furnish a safe place of work (Labor Law, § 200). It is not an instance of respondeat superior. It is the case of the nonperformance of a nondelegable duty. Hankins v. N. Y., L. E. & W. R. R. Co., 142 N. Y. 416, 420, 37 N. E. 466, 25 L. R. A. 396, 40 Am. St. Rep. 616. There are a host of other provisions in the Labor Law where the duty must be held personal, or we nullify the statute (sections 69, 79, 81, 83a, 83b, 94).

"The employer, therefore is chargeable with the sufferance of illegal conditions by the delegates of his power."

principal or master also. May they be joined as defendants in one action? There was technical difficulty at common law, where the servant must be sued in an action of trespass and the master in an action on the case. This difficulty has now been largely removed by statute. There was also thought to be some inherent difficulty in joining in one action defendants liable on such diverse grounds. It was said that the tort was not their joint act.[97]

In most States now they may be jointly sued.[98]

§ 565. Master usually not liable if servant not.—Since it is the servant's tort, for which liability is imputed to the master, which is here involved, it is generally held to follow that if the servant is not liable, the master can not be; and an acquittal of the servant will discharge the master.[99] This would not be true, of course, if the master was personally at fault.

§ 566. Damages — Compensatory — Exemplary. — If the principal or master is held liable, he must pay at least compensatory damages, however innocent he may personally be. If the wrong was committed under circumstances which aggravated it, such as insult, wantonness, malice, or oppression, the agent or servant himself would often be liable to what are called exemplary or punitive damages. May such damages in such a case be awarded against a principal or master who did not direct, participate in, or approve the wrong? Many cases, it is believed rightly, answer in the negative.[1] But there are also many courts which permit them, even where the principal or master is personally free from blame.[2]

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[97] See Helms v. Railway Co. (1903), 120 Fed. 389; Campbell v. Sugar Co. (1873), 62 Me. 552, 16 Am. Rep. 503; Mulchey v. Methodist Society (1878), 125 Mass. 487; Clark v. Fry (1858), 8 Ohio St. 358, 72 Am. Dec. 59.

Of course, if the principal or master actually participated, the situation was different.

[98] See Southern Ry. Co. v. Grizzle (1905), 124 Ga. 735, 53 S. E. 244, 110 Am. St. R. 191; Dowell v. Railway Co. (1910), 83 Kan. 562, 112 Pac. 136; New Ellerslie Club v. Stewart (1906), 123 Ky. 8, 93 S. W. 598, 9 L. R. A. (N. S.) 475; Mayberry v. Railway Co. (1907), 100 Minn. 79, 110 N. W. 356, 10 Ann. Cas. 754, 12 L. R. A. (N. S.) 675; McGinnis v. Railway Co. (1906), 200 Mo. 347, 98 S. W. 590, 118 Am. St. R. 661, 9 Ann. Cas. 656, 9 L. R. A. (N. S.) 880; Schumpert v. Railway Co. (1902), 65 S. Car. 332, 43 S. E. 813, 95 Am. St. R. 802; Howe v. Railway Co. (1902), 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949.

See also as to such joinder as a device to give Federal courts jurisdiction: Wecker v. Enameling Co. (1906), 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, 9 Ann. Cas. 757.

[99] See McGinnis v. Railway Co., *supra;* Bradley v. Rosenthal (1908), 154 Cal. 420, 97 Pac. 875, 129 Am. St. R. 171; Doremus v. Root (1901), 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649; Horgan v. Railway Co. (1911), 208 Mass. 287, 94 N. E. 386, New Orleans, etc., Ry. Co. v. Jopes (1891), 142 U. S. 18, 12 Sup. Ct. 109, 35 L. Ed. 919. Otherwise in Kentucky.

The caution given to the jury in an early case by Baron Parke that, since the master was not guilty of any offense and was only responsible in law, the amount of damages awarded should be reasonable,[3] has long since been forgotten.

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[1] See Lake Shore, etc., R. Co. v. Prentice (1893), 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97, Mechem & Gilbert Cas. on Damages 112; Cleghorn v. Railroad Co. (1874), 56 N. Y. 44, 15 Am. Rep. 375; Pollock v. Gantt (1881), 69 Ala. 373, 44 Am. Rep. 519; Maisenbacker v. Concordia Society (1899), 71 Conn. 369, 42 Atl. 67, 71 Am. St. R. 213; Moore v. Railway Co. (1910), 26 Okla. 682, 110 Pac. 1059; Sullivan v. Oregon Railway Co. (1885), 12 Oreg. 392, 7 Pac. 508, 53 Am. Rep. 364; Staples v. Schmid (1893), 18 R. I. 224, 26 Atl. 193, 19 L. R. A. 824, Wambaugh's Cas. 243; Western Un. Tel. Co. v. Brown (1882), 58 Tex. 170, 44 Am. Rep. 610; Spokane Truck Co. v. Hoefer (1891), 2 Wash. 45, 25 Pac. 1072, 26 Am. St. R. 842, 11 L. R. A. 689; Craker v. Railway (1875), 36 Wis. 657, 17 Am. Rep. 504, Mechem & Gilb. Cas. on Damages 118.

[2] See Goddard v. Railway Co. (1869), 57 Me. 202, 2 Am. Rep. 39, Mechem & Gilb. Cas. on Damages 101; Citizens' Street Ry. Co. v. Steen (1883), 42 Ark. 321; Gasway v. Railroad Co. (1877), 58 Ga. 216; Singer Mfg. Co. v. Holdfodt (1877), 86 Ill. 455, 29 Am. Rep. 43; Wheeler & W. Mfg. Co. v. Boyce (1887), 36 Kan. 350, 13 Pac. 309, 59 Am. Rep. 571; Louisville, etc., R. Co. v. Ballard (1887), 85 Ky. 307, 9 Ky. Law R. 7, 3 S. W. 530, 7 Am. St. R. 600; Southern Exp. Co. v. Brown (1889), 67 Miss. 260, 7 So. 318, 8 So. 425, 19 Am. St. R. 306; Atlantic, etc., Ry. Co. v. Dunn (1869), 19 Ohio St. 162, 2 Am. Rep. 382; Rucker v. Smoke (1892), 37 S. Car. 377, 16 S. E. 40, 34 Am. St. R. 758; Louisville, etc., R. Co. v. Garrett (1881), 76 Tenn. (8 Lea) 438, 41 Am. Rep. 640.

[3] Joel v. Morison (1834), 6 Car. & P. 501, Wambaugh's Cas. 117.

§ 567. Election by judgment.—As has been seen, it is usually held in the contract cases that if the other party, with knowledge of the existence of the principal, and a power to choose between him and the agent, takes a judgment against either one, that constitutes a conclusive determination to hold that one only.[4]

In the tort cases, however, following the general rule respecting joint wrong-doers, it is held that an unsatisfied judgment against the agent is no bar to a subsequent proceeding against the principal.[5]

[4] See *ante* § 468.

[5] See Maple v. Railroad Co. (1883), 40 Ohio St. 313, 48 Am. Rep. 685.

CHAPTER XVI.

OF THE DUTIES AND LIABILITIES OF THIRD PERSONS TO THE AGENT.

§568. In general.

1. *In Contract.*

569. Agent usually has no right of action.
570. Principal may clothe agent with title to enable him to sue.
571. On contract made with agent as the only principal, agent may sue.
572. On contract made for undisclosed principal, agent may sue.
573. On contract made in agent's name for a disclosed principal, agent may sue.
574. On sealed or negotiable instrument, made in agent's name, agent must sue.
575. Agent having special interest or property in subject matter may sue—Auctioneer—Factor.
576. What defenses may be made.
577. What damages may be recovered.
578. Effect of termination of authority.
579. Right of apparent agent to show himself principal.
580. Right of agent to recover money paid by him.

2. *In Tort.*

581. What actions maintainable.
582. Agent may sue for wrongs causing personal injury to himself.

§ 568. **In general.**—The question of the liability of the third person to the agent may present the same two aspects which have been noticed in the preceding subdivisions, namely, the liability: 1. In Contract. 2. In Tort.

1. *In Contract.*

§ 569. **Agent usually no right of action.**—The agent usually has no right of action against third persons upon contracts made by him with them for his principal. His duty is, in general, as has been seen, to act in the name as well as for the benefit of his principal; and where he has done so, the rights of action must of course accrue to the principal.

Obtaining causes of action for himself is usually not within either the authority or the duty of the agent. This, as has been seen, is constantly the rule with respect of the ordinary informal contracts negotiated by the agent for his principal; they are presumed to be made with the principal and not with the agent.

Exceptional cases, however, may arise which require exceptions to the rule. These cases may ordinarily be grouped under three general heads: 1. Where the principal has clothed the agent with title to enable him to sue. 2. Where the contract was made with the agent as the principal exclusively. 3. Where the contract was made with the agent as a party but not necessarily the exclusive one. The following instances will illustrate these rules.

§ 570. Principal may clothe agent with title to enable him to sue.—The principal may by assignment of a contract (where an assignee may sue in his own name), or by endorsement of a negotiable instrument, clothe an agent, who otherwise would have no right, with a legal title and authority sufficient to enable him to maintain an action in his own name, even though the recovery is to be for the benefit of the principal. Whether this is true under the common code requirement that actions shall be brought in the name of the real party in interest, is in some dispute, depending partly upon the particular phraseology of the code.[1]

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[1] See Cottle v. Cole (1866), 20 Iowa 481; Searing v. Berry (1882), 58 Iowa 20, 11 N. W. 708; Sheridan v. Mayor (1876), 68 N. Y. 30.

Contra. See Brown v. Ginn (1902), 66 Ohio St. 316, 64 N. E. 123; Abrams v. Cureton (1876), 74 N. Car. 523.

On note taken to his own order by an agent *with his principal's consent*, the agent may sue. Martin v. Mask (1912), 158 N. Car. 436, 74 S. E. 343, 41 L. R. A. (N. S.) 641.

An indorsee of a note, though merely for collection, may sue: Abell Note Co. v. Hurd (1892), 85 Iowa 559, 52 N. W. 488; Second Nat. Bank v. Alma Bank (1911), 99 Ark. 386, 138 S. W. 472; Boyd v. Corbitt (1877), 37 Mich. 52; White, Bonner & Wright v Stanley (1876), 29 Ohio St. 423.

But see Thatcher v. Winslow (1828), 5 Mason (U. S. C. C.) 58,

§ 571. On contract made with agent as the only principal, agent may sue.—Where at the time of making the contract there is an election to deal with the agent alone as the contracting party, the contract is with him and he alone may sue upon it.[2]

§ 572. On contract made for undisclosed principal agent may sue.—On a contract made by an agent in his own name but really for an undisclosed principal, the agent *may* sue;[3] though here, as will be seen,[4] the principal may usually at his option maintain the action himself. Here the contract was made with the agent as the party, but, since the principal was not disclosed, the agent was not necessarily in law the exclusive party. There can ordinarily be no election of parties until both are known.[5]

§ 573. On contract made in agent's name for a disclosed principal, agent may sue.—On a contract, in writing, made in the agent's own name but for a disclosed principal, the agent may be sued, as has been seen,[6] and he may also sue.[7] But here also the principal may at his option usually maintain the

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Fed. Cas. No. 13863, Goddard's Cas. 701 (agent with authority but no title can not sue).

[2] See Elbinger Actien Gesellschaft v. Claye (1873), L. R. 8 Q. B. 313, Wambaugh's Cas. 542.

[3] See Joseph v. Knox (1813), 3 Camp. 320, Wambaugh's Cas. 664; Gardner v. Davis (1825), 2 Car. & P. 49, Wambaugh's Cas. 666; Short v. Spackman (1831), 2 B. & Ad. 962, Goddard's Cas. 709, Wambaugh's Cas. 667; U. S. Tel. Co. v. Gildersleeve (1868), 29 Md. 232, 96 Am. Dec. 519, Wambaugh's Cas. 668; Ludwig v. Gillespie (1887), 105 N. Y. 653, 11 N. E. 835, Wambaugh's Cas. 672; Carter v. Railway Co. (1900), 111 Ga. 38, 36 S. E. 308, 50 L. R. A. 354.

It is also said that the agent may enforce the contract though the principal has renounced it. Kelly, etc., Co. v. Barber, etc., Co. (1914), 211 N. Y. 68, 105 N. E. 88, L. R. A. 1915C, 256, citing Short v. Spackman, *supra*.

That agent has since become bankrupt, does not defeat his right to sue. Rhoades v. Blackiston (1871), 106 Mass. 334, 8 Am. Rep. 332, Mechem's Cas. 584, Wambaugh's Cas. 736.

[4] See *post* § 592.

[5] See *ante* § 368.

[6] See *ante* § 372.

[7] See Albany, etc., Co. v. Lundberg (1887), 121 U. S. 451, 7 Sup.

action.[8] This contract also was made with the agent as the party, but not necessarily as the exclusive one. That is a question of fact.

§ 574. On sealed instruments or negotiable instruments made in agent's name, agent must sue.—If, though acting for the principal, the agent makes a contract under seal in his own name,[9] or if he takes a negotiable instrument payable to himself alone,[10] the action must be brought in the name of the agent, though the recovery will be for the benefit of the principal.

§ 575. Agent having special interest or property in subject matter may sue—Auctioneer—Factor.—An auctioneer or a factor who has sold goods for a principal may usually sue in his own name to collect the price or enforce the contract.[11] Such agents ordinarily sell in their own name, and are usually said to have a "special property" in the goods. They frequently advance money to the principal upon the security of the goods and their proceeds, and where they have done so, they acquire a right to sue which cannot be cut off without reimbursement.[12]

Other agents may be in the same position.[13]

Ct. 958, 80 L. Ed. 982; Leach v. Hill (1898), 106 Iowa 171, 76 N. W. 667; Deitz v. Ins. Co. (1888), 31 W. Va. 851, 8 S. E. 616, 13 Am. St. R. 909.

[8] See *post* § 585.

[9] See Briggs v. Partridge (1876), 64 N. Y. 357, 21 Am. Rep. 617, Mechem's Cas. 436; Schaefer v. Henkel (1878), 75 N. Y. 378, Goddard's Cas. 712; Neff v. Baden (1843), 42 Ky. (3 B. Mon.) 468, Goddard's Cas. 715.

[10] See *post* § 586.

[11] See Thompson v. Kelly (1869), 101 Mass. 291, 3 Am. Rep. 353, Mechem's Cas. 653; Graham v. Duckwall (1871), 71 Ky. (8 Bush) 12; Whitehead v. Potter (1844), 26 N. Car. 257; Beardsley v. Schmidt (1904), 120 Wis. 405, 98 N. W. 235, 102 Am. St. R. 991 (where it is said that a factor may sue in his own name though he did not sell in his own name).

[12] See Young v. Thurber (1883), 91 N. Y. 388.

[13] See Baltimore Steamboat Co. v. Atkins (1854), 22 Pa. St. 522; Field v. Price (1873), 50 Ga 135

§ 576. **What defenses may be made.**—When the agent sues in his own name, the other party may ordinarily make any defense against the agent which he may have, either against the agent who sues, or against the principal in whose behalf the action is brought.[14]

But where the agent sues to protect an interest of his own his recovery can not usually be defeated by allowing claims against his principal.[15]

Inasmuch as set-off is usually a matter of statute, and the statutes are not entirely uniform, this question may be affected by the terms of a particular statute.[16]

§ 577. **What damages may be recovered.**—Where the agent may sue, he may ordinarily recover the full damages for the breach of the contract, even though the principal will be entitled to them when recovered.[17] But he can not ordinarily recover in such a case more than the principal could have recovered if he had sued.[18]

§ 578. **Effect of termination of authority.**—The right of the agent to sue, so far as it depends merely upon the existence of that relation, and is not supported by an interest of the agent for his own security or protection, would cease upon the revocation or other termination of his authority.[19]

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[14] See Gibson v. Winter (1833), 5 B. & Ad. 96, Wambaugh's Cas. 730; Gardner v. Allen (1844), 6 Ala. 187, 41 Am. Dec. 45; Holden v. Railroad Co. (1901), 73 Vt. 317, 50 Atl. 1096, Goddard's Cas. 717; Leterman v. Lumber Co. (1910), 110 Va. 769, 67 S. E. 281, Goddard's Cas. 704; Atkinson v. Cotesworth (1825), 3 B. & C. 647, Wambaugh's Cas. 729; Woolley v. Loose (1920), 57 Utah 336, 194 Pac. 908, 14 A. L. R. 372.

[15] Set off of claim against the principal cannot be made if it would defeat agent's right to reimbursement for advances: Young v. Thurber (1883), 91 N. Y. 388.

[16] Compare Isberg v. Bowden (1853), 8 Exch. 852, Wambaugh's Cas. 734; Bliss v. Sneath (1894), 103 Cal. 43, 36 Pac. 1029, Wambaugh's Cas. 739.

[17] See Groover v. Warfield (1874), 50 Ga. 644; U. S. Tel. Co. v. Gildersleve (1868), 29 Md. 232, 96 Am. Dec. 519, Wambaugh's Cas. 668; Leterman v. Lumber Co. *supra*.

[18] See Evrit v. Bancroft (1871), 22 Ohio St. 172.

§ 579. Right of apparent agent to show himself principal. —A different sort of question is presented when one who has contracted as an apparent agent seeks to show that he was himself the principal, and then to enforce the contract on his own account. It presents two aspects:

1. *Where no specific principal was named,* but the agent contracted, *e. g.,* as "agent for the owner," or "agent for the freighter," inasmuch as the other party could not ordinarily in such a case have relied upon the character, credit or other personal quality of a particular principal, it is held that the apparent agent may show that he was himself the owner or the freighter, and enforce the contract on his own account. Such evidence does, it is true, to a slight extent contradict the contract, which seemed to show that there was someone else as principal,[20] but unless the other party can show that he was in fact prejudiced, such variance is usually deemed to be negligible.[21] The terms of the contract, however, may exclude it.[22]

2. *Where the contract was made as agent for a named principal,* and is as yet unperformed on the principal's side, no other person may, in any case in which it may fairly be considered

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[19] See Miller v. Bank (1894), 57 Minn. 319, 59 N. W. 309, Goddard's Cas. 704.

[20] That is, the other party might possibly prefer to have "*any* one else, be he who he might, as principal."

[21] See Schmaltz v. Avery (1851), 16 Q. B. 655, Wambaugh's Cas. 631; Harper v. Vigers, [1909] 2 K. B. 549; Rodliff v. Dallinger (1886), 141 Mass. 1, 4 N. E. 805, 55 Am. Rep. 439.

Professor Williston thinks the other party should be entitled to rescind upon restoring any benefit received. 1 Williston, Contracts, § 286, note.

Compare Sharman v. Brandt (1871), L. R. 6 Q. B. 720, which failed because the agent as plaintiff could not show a memorandum to satisfy the statute of frauds.

[22] Thus where the contract provided that the apparent agents should have none of the responsibilities of principals, it was held to be incompetent for them to claim the attitude and rights of principals. Paine v. Loeb (1899), 37 C. C. A. 434, 96 Fed. 164.

that the skill, ability, solvency or other personal quality of the named principal was a material element in the contract, insist upon substituting himself as the real principal.[23] If the other party with knowledge consents to take his performance, there would ordinarily be no objection, but such knowledge and consent would be indispensable.[24]

If the contract involved no personal considerations, the case is not so clear. It has been said that the substitution may be made, if notice is given before the action.[25] If a substituted performance be accepted without objection, there would seem to be no difficulty.[26]

§ 580. **Right of agent to recover money paid by him.**—An agent from whom the principal's money has been obtained by mistake or fraud, or upon an illegal contract which he did not know to be such, may sue in his own name to recover it.[27]

2. *In Tort.*

§ 581. **What actions maintainable.**—A mere servant who has only the *custody* of his master's goods may not ordinarily bring actions against third persons with respect of the goods; the master himself should bring such actions.[28]

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[23] See Boston Ice Co. v. Potter (1877), 123 Mass. 28, 25 Am. Rep. 9; Arkansas Smelting Co. v. Belden (1888), 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246; King v. Batterson (1880), 13 R. I. 117, 43 Am. Rep. 13; Lansden v. McCarthy (1869), 45 Mo. 106; Boulton v. Jones (1857), 2 H. & N. 564; Bullock v. Ueberroth (1899), 121 Mich. 293, 80 N. W. 39.

[24] Accepting or tendering performance with knowledge would be evidence of such consent. See Mudge v. Oliver (1861), 83 Mass. (1 Allen) 74; Orcutt v. Nelson (1854), 67 Mass. (1 Gray) 536; Barnes v. Shoemaker (1887), 112 Ind. 512, 14 N. E. 367; Rayner v. Grote (1846), 15 Mees. & W. 359.

[25] See Bickerton v. Burrell (1816), 5 Maule & Sel. 383; Foster v. Smith (1865), 2 Cold. (Tenn) 474, 88 Am. Dec. 604; Bowstead on Agency (3d ed.) 401; Huffcut on Agency (2d ed.) 259.

Compare Pollock on Contracts (8th ed.) 110, 111.

[26] See Whiting v. Crawford (1901), 93 Md. 390, 49 Atl. 615.

[27] See Kent v. Bornstein (1866), 94 Mass. (12 Allen) 342, Goddard's Cas. 711; Parks v. Fogleman (1906), 97 Minn. 157, 105 N. W. 560, 114 Am. St. R. 703, 4 L. R. A. (N. S.) 363.

But an agent with *possession* who has undertaken some duty with respect of the goods, or who has a special property or interest in them, may usually maintain actions against third persons who interfere with his possession or who by actionable conduct injure or destroy the goods.[29]

As against such a wrong-doer, the agent may ordinarily recover the full value of the goods if converted or destroyed, holding any surplus over his own interest in trust for the principal.

§ 582. Agent may sue for wrongs causing personal injury to himself.—For wrongs personal to himself, though connected with the agency, the agent may of course sue.

He may thus recover of third persons in tort for frauds or deceits practiced by them upon him while he was engaged in making contracts with them on the principal's account, and which have rendered him liable to his principal.

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[28] See Faulkner v. Brown (1834), 13 Wend. (N. Y.) 63; Tuthill v. Wheeler (1849), 6 Barb. (N. Y.) 362; Gillett v. Ball (1848), 9 Pa. 13; Chatfield v. Clark (1905), 123 Ga. 867, 51 S. E. 743; Galveston, etc., Ry. Co. v. Stockton (1897), 15 Tex. Civ. App. 145, 38 S. W. 647.

[29] See Fitzhugh v. Wiman (1854), 9 N. Y. 559; Little v. Fossett (1852), 34 Me. 545, 56 Am. Dec. 671; Brown v. Shaw (1892), 51 Minn. 266, 53 N. W. 633; Robinson v. Webb (1875), 74 Ky. (11 Bush) 464; Beyer v. Bush (1873), 50 Ala. 19; Harker v. Dement (1850), 9 Gill (Md.) 7, 52 Am. Dec. 670; Dillenback v. Jerome (1827), 7 Cow. (N. Y.) 294.

Compare Ward v. Ryba (1897), 58 Kan. 741, 51 Pac. 223.

Agent entrusted with money to pay expenses of a traveling companion may maintain action against a sleeping car company for loss by its negligence while in his possession: Pullman Car Co. v. Gavin (1893), 93 Tenn. 53, 23 S. W. 70, 42 Am. St. R. 902, 21 L. R. A. 298.

As to when agent as consignee may sue carrier, see Missouri Pac. Ry. Co. v. Implement Co. (1906), 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, 117 Am. St. R. 468, 9 Ann. Cas. 790, 6 L. R. A. (N. S.) 1058; Grinnell v. Railway Co. (1910), 109 Minn. 513, 124 N. W. 377, 26 L. R. A. (N. S.) 437; Boston, etc., He may also recover of them for damages caused by their actionable wrong in procuring his dismissal by his principal; and for slander or other wrong whereby they deprive him of his right to earn the stipulated compensation or commission.[36]

Ry. Co. v. Mower Co. (1884), 76 Me. 251; Thomas v. Railroad Co. (1910), 85 S. Car. 537, 64 S. E. 220, 34 L. R. A. (N. S.) 1177.

[36] See Lucke v. Clothing Cutters Assembly (1893), 77 Md. 396, 26 Atl. 505, 39 Am. St. R. 421, 19 L. R. A. 408; Raycroft v. Tayntor (1896), 68 Vt. 219, 35 Atl. 53, 54 Am. St. R. 882, 33 L. R. A. 225; Whittemore v. Weiss (1876), 33 Mich. 348; Perkins v. Pendleton (1897), 90 Me. 166, 38 Atl. 96, 60 Am. St. R. 252; Chipley v. Atkinson (1887), 23 Fla. 206, 1 So. 934, 11 Am. St. R. 367; Moran v. Dunphy (1901), 177 Mass. 485, 59 N. E. 125, 83 Am. St. R. 289, 52 L. R. A. 115; Curran v. Galen (1897), 152 N. Y. 33, 46 N. E. 297, 57 Am. St. R. 496, 37 L. R. A. 802; Lopes v. Connolly (1912), 210 Mass. 487, 97 N. E. 80, 38 L. R. A. (N. S.) 986.

Sayre, 36 Harvard Law Review, 663.

As to right to injunction, see Kemp v. Division (1912), 255 Ill. 213, 99 N. E. 389.

CHAPTER XVII.

OF THE DUTIES AND LIABILITIES OF THIRD PERSONS TO THE PRINCIPAL.

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§ 583. **In general.**—The question of the duties and liabilities of third persons to the principal, will be considered under the classification: 1. In Contract, 2. To recover money or property and 3. In tort.

1. *In Contract.*

§ 584. How treated here.—The question here involved may be considered in two aspects, as in the preceding chapter, namely, *a.* The Disclosed Principal. *b.* The Undisclosed Principal.

a. The Disclosed Principal.

§ 585. What contracts principal may enforce.—The principal may enforce against third persons all lawful contracts made in his own name with them by his agent. This is, of course, the ordinary and familiar case. Here the principal will be disclosed and the contract will be made in his name and in his behalf. He may sue either at law or in equity as in any other case.

The principal may sue upon and enforce all informal contracts, which, though not formally made in his name, were nevertheless made for him and on his account, and not with the agent personally. As has been seen, there is a constant presumption that a known agent, known to be acting as such, intends to bind the principal and not himself personally.[1]

On contracts, though in writing, (not sealed or negotiable) made in the agent's name, but for the principal, the principal may ordinarily sue.[2] As has been seen there is generally no necessary presumption from the writing that the principal was excluded.[3] It is true, as seen in the preceding chapter, that the agent may sue in such a case, but the principal's right is ordinarily paramount.[4] There can, of course, be but one satisfaction.

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[1] See *ante* § 377.

[2] See Ford v. Williams (1858), 62 U. S. (21 How.) 287, 16 L. Ed. 36, Goddard's Cas. 791; Beebee v. Robert (1834), 12 Wend. (N. Y.) 413, 27 Am. Dec. 132, Goddard's Cas. 792; Nicoll v. Burke (1879), 78 N. Y. 580, 8 Abb. N. C. 213; Choate v. Stander (1916), 61 Okla. 148, 160 Pac. 737; Powell v. Wade (1895), 109 Ala. 95, 19 So. 500, 55 Am. St. R. 915; Kingsley v. Siebrecht (1898), 92 Me. 23, 42 Atl. 249, 69 Am. St. R. 486.

[3] See *ante* § 374.

§ 586. **What contracts principal may not enforce.**—If, at the time the contract was made, there was an election to deal with the agent only, then the principal may not sue.[5]

So if a contract in writing expressly ascribes to the agent a character which the principal now seeks to take to himself,—as where the contract declares that the agent is the owner, and the principal now seeks to show that he himself was the owner,—so that, to enable the principal to sue, he must contradict that contract, it is held that he may not sue.[6]

Upon contracts under seal, or negotiable instruments, made in the agent's name alone, the principal may not sue.

§ 587. **Upon contracts made without authority but subsequently ratified, principal may usually sue.**—As has been already seen, where a contract has been made for and in the name of a disclosed principal, but without authority, the principal, by ratifying the contract, within the rules there disclosed, may usually enforce the contract as though originally made by his authority.[7]

§ 588. **Fruits or proceeds of contract belong to principal.**—Not only may the principal enforce contracts made for him by his agent, but the fruits or proceeds of authorized contracts belong to him.[8] Thus, if an agent is authorized to buy property for his principal and does so, the property belongs to the principal.[9] If a servant is employed for him, he is entitled to the service. If a cause of action is acquired for him, he may enforce it. If the fact that his agent had, or had not, notice or knowledge is material to him, he may avail himself of that fact, at least unless his own knowledge interferes.[10]

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[4] See Wilson v. Groelle (1892), 83 Wis. 530, 53 N. W. 900.

[5] See Elbinger Actien-Gesellschaft v. Claye (1873), L. R. 8 Q. B. 313, Wambaugh's Cas. 542.

[6] See Humble v. Hunter (1848), 12 Q. B. 310, Wambaugh's Cas. 629; Rederiaktiebolaget Argonaut v. Hani, [1918] 2 K. B. 247.

[7] See *ante* §§ 160, 161.

[8] See Brooks v. Cook (1904), 141 Ala. 499, 38 So. 641; Fleming v. Bank [1900], App. Cas. 577.

[9] See Edwards v. Dooley (1890),

b. The Undisclosed Principal.

§ 589. Undisclosed principal may sue.—It has already been seen that where a contract was in fact made for and on account of a principal, though his existence or interest was not disclosed at the time, he may usually be held upon the contract when he is discovered.[11] The converse of that situation is also true. A previously undisclosed principal may usually sue upon and enforce, either at law or in equity as the situation may require, all simple contracts, whether written or unwritten, which were in fact made on his account, even though the other party had no knowledge of his existence or interest, and made the contract with the agent, supposing him to be the principal.[12] Although this rule seems to be an anomalous one, it is thor-

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120 N. Y. 540, 24 N. E. 827; Gussner v. Hawks (1904), 13 N. Dak. 453, 101 N. W. 898.

A broker purchasing and carrying stocks on a margin for a principal, is usually regarded as a pledgee; in some States, as an owner. See 7 Minnesota Law Review, 398; 35 Harvard Law Review, 485, 506.

[10] See Haines v. Starkey (1901), 82 Minn. 230, 84 N. W. 910; Stansell v. Cleveland (1885), 64 Tex. 660.

[11] See *ante* § 465.

[12] See Huntington v. Knox (1851), 61 Mass. (7 Cush.) 371, Mechem's Cas. 587 Wambaugh's Cas. 634; Woodruff v. McGehee (1860), 30 Ga. 158, Goddard's Cas. 794; Western Un. Tel. Co. v. Northcutt (1908), 158 Ala. 539, 48 So. 553, 132 Am. St. R. 38; Parker v. Cochrane (1888), 11 Colo. 363, 18 Pac. 209; Sullivan v. Shailor (1898), 70 Conn. 733, 40 Atl. 1054; Central R. Co. v. James (1903), 117 Ga. 832, 45 S. E. 223; Rice Malting Co. v. Bank (1900), 185 Ill. 422, 56 N. E. 1062; Harkness v. Telegraph Co. (1887), 73 Iowa 190, 34 N. W. 811, 5 Am. St. R. 672; Hawkins v. Windhorst (1912), 87 Kan. 176, 96 Pac. 48, 17 L. R. A. (N. S.) 1008; Mitchell v. Land Co. (1910), 19 N. Dak. 736, 124 N. W. 946; Kelly, etc., Co. v. Barber, etc., Co. (1914), 211 N. Y. 68, 105 N. E. 88, L. R. A. 1915C, 256; Rankin v. Bank (1908), 20 Okla. 68, 93 Pac. 536, 18 L. R. A. (N. S.) 512; Kitchen v. Holmes (1902) 42 Oreg. 252, 70 Pac. 830; Reed v. Klaus (1893),

oughly established in English and American law. The identity and interest of the principal may be shown by parol evidence.[13] By the prevailing rule, an undisclosed principal may not ratify.

§ 590. —— The burden of proving that he *was* the undisclosed principal as he claims to be, and that the contract was really made on his account, rests upon the principal.[14]

That fact being shown, the undisclosed principal may, it is held, sue even though the other party contends that he would never have made the contract if the interest of the principal had been known, and that the principal was kept undisclosed because this was suspected.[15]

§ 591. What kind of actions he may bring.—This right of the undisclosed principal to sue embraces every appropriate action by which the rights of the principal can be protected under it, or by which he can secure the benefits and advantages which flow from the contract. Thus, he may have specific performance; he may recover for goods sold, or work done or money loaned, by his agent; he may demand and receive performance to himself of agreements made by his agent for the purchase of goods; and the like. He may also bring actions against carriers in respect of goods shipped by his agent, or against telegraph companies upon contracts made with them by his agent.

Where the statute of frauds is involved, the undisclosed principal may avail himself of any appropriate note or memorandum signed by or running to his agent.

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152 Pa. 341, 25 Atl. 491; Battey v. Lunt (1909), 30 R. I. 1, 73 Atl. 353, 136 Am. St. R. 926.

[13] See Huntington v. Knox, *supra*.

[14] See Powell v. Wade (1895), 109 Ala. 95, 19 So. 500, 55 Am. St. R. 915; Shields v. Coyne (1910), 148 Iowa 313, 127 N. W. 63, Ann. Cas. 1912C, 905, 29 L. R. A. (N. S.) 472.

One of several joint principals may not sue alone on an *entire* contract: Roosevelt v. Doherty (1880), 129 Mass. 301, 37 Am. Rep. 356, Wambaugh's Cas. 681; Midwood v. Packers' Ass'n (1907), 28 R. I. 303, 67 Atl. 61, 13 Ann. Cas. 954. Otherwise where it is severable.

[15] Kelly, etc. Co. v. Barber, etc. Co., *supra*, no other claim of fraud being made.

What might otherwise be thought to be the hardship resulting from the rule permitting the undisclosed principal to enforce the contract, is, in practice, tempered by the operation of certain other rules, conspicuous among which are the one respecting the defenses which the other party may make, and the one respecting so-called personal considerations,—both of which will be considered.

§ 592. Principal's right of action superior to agent's.— Where the undisclosed principal is permitted to sue, his right of action, if he care to exercise it, is ordinarily superior to that of the agent, and he may, by giving notice of his rights to the other party and demanding performance to himself, cut-off the agent's right to sue, in any case in which the agent has not some interest of his own to protect by the action. He may doubtless, also, upon proper application be permitted to intervene in and control a pending action.

§ 593. Exceptions—Sealed or negotiable instruments.— Where the common-law attributes of a seal still exist, the undisclosed principal is generally not permitted to sue upon a sealed instrument appearing to be made with the agent alone. So he may not ordinarily sue upon a negotiable instrument payable to the agent only; although the agent's cause of action would ordinarily be held in trust for the principal.

§ 594. —— Contracts involving personal considerations.— The right of an undisclosed principal to enforce a contract may be affected by what are sometimes termed "personal considerations." For example, a promise to marry a certain person is not a promise to marry his undisclosed principal, and an undisclosed principal could not enforce it. The other party is entitled to receive that which was the consideration for his promise.[16] This the undisclosed principal may not be able to supply. If it has already been supplied by the one who was to supply it, or in the circumstances is not material, then the difficulty may be removed.[17]

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[16] Thus, in Humble v. Hunter (1848), 12 Q. B. 310, Wambaugh's Cas. 629, Lord Denman, C. J., said: "You have a right to the benefit you contemplate from the character, credit and substance

Personal considerations are not only those of individual taste or preference, as in contracts to marry, or to render personal service, and the like; but financial responsibility, skill and experience may be included. Thus the undisclosed principal's note or warranty may not be as good as that of the agent, and could not in any event be tendered in performance of a contract to supply the agent's note or warranty. An agreement to supply wheat or other similar goods, on the other hand, may be performed by the delivery of any wheat of the prescribed grade.

It is, however, possible even in the case of property that the question whether it had, or had not, been owned, used, pre-

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of the party with whom you contract."

In Arkansas Valley Smelting Co. v. Belden (1888), 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246, Gray, J., said: "Every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent."

Where a person has contracted for a warranty deed, with the warranty of one person, the agent, he cannot be compelled to take instead of that the warranty deed of an undisclosed principal: Birmingham Matinee Club v. McCarty (1907), 152 Ala. 571, 44 So. 642, 15 Ann. Cas. 237, 13 L. R. A. (N. S.) 156. Same: Pancoast v. Dinsmore (1909), 105 Me. 471, 75 Atl. 43, 134 Am. St. R. 582.

A contract to loan money on the agent's note secured by a mortgage on land is not satisfied by an offer of the principal's note secured by a mortgage on the same land, as it can not be assumed that the personal responsibility was immaterial: Shields v. Coyne (1910), 148 Iowa 313, 127 N. W. 63, Ann. Cas. 1912C, 905, 29 L. R. A. (N. S.) 472.

[17] If the other party has received, or been secured, the consideration, so that nothing remains but to collect the price, there could ordinarily be no objection to a recovery by the principal. See Grojan v. Wade (1818), 2 Stark. 443; Warder v. White (1883), 14 Ill. App. 50; Sullivan v. Shailor (1898), 70 Conn. 733, 40 Atl. 1054.

So if the other party with knowledge has accepted performance from the principal. See Sullivan v. Shailor, *supra*.

Or if the other party totally repudiates the contract and refuses to take either party's performance, it would seem to make pared by or associated with a particular person, might be material.[18]

A contract of guaranty or suretyship has been held to be so completely personal and *strictissimi juris* as not to be available where the goods were furnished or the credit was extended by any one to whom the assurance was not in terms given, and for whom there was nothing to indicate that the person to whom it was addressed was acting.[19]

§ 595. What defenses may be made against undisclosed principal.—The undisclosed principal, if he would entorce the contract, must ordinarily take it as he finds it. He will be subject to all the defenses which arise out of the terms and conditions of the contract itself.[20] He will also ordinarily be subject to the legal consequences of fraud practiced by the agent, or of notice to, or knowledge of, the agent.[21]

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the personal question immaterial.

So if there was money to be paid by the other party first, and not contemporaneously with performance, it would not usually prejudice the other party to permit the principal to recover. The other party still has the same security that he originally had: the liability of the agent.

But if there had to be a tender of performance to put the other party into default, the case would be different.

[18] Thus in Winchester v. Howard (1867), 97 Mass. 303, 93 Am. Dec. 93, Goddard's Cas. 794, the question of who had owned and handled a yoke of oxen, was deemed material.

[19] See Barns v. Barrow (1874), 61 N. Y. 39, 19 Am. Rep. 247 (a partnership case); King v. Batterson (1880), 13 R. I. 117, 43 Am. Rep. 13. Compare National Bank v. Diefendorf (1878), 90 Ill. 396.

Where evidence shows that no particular person was addressed: Beakes v. De Cunha (1891), 126 N. Y. 293, 27 N. E. 251; or guaranty was addressed to a bank in the name of the cashier, Michigan State Bank v. Peck (1855), 28 Vt. 200, 65 Am. Dec. 234.

[20] See Eldridge v. Finnegar (1909), 25 Okla. 28, 105 Pac. 334, 28 L. R. A. (N. S.) 227.

[21] See Dodge v. Tullock (1896), 110 Mich. 480, 68 N. W. 239; Ritch v. Robertson (1919), 93 Conn. 459, 106 Atl. 509, 7 A. L. R. 81. In this respect the situation is quite like that presented where a principal ratifies a contract and is held responsible for the means, etc. See Mundorff v. Wickersham (1869), 63 Pa. 87, 3 Am. Rep. 531; Schultz v. McLean (1892), 93 Cal. 329, 28 Pac. 1053; Commercial

With respect of defenses which do not arise from the contract itself, but from other transactions, like set-off, the principal, who has permitted or caused the agent to appear to be the real principal by clothing him, for example, with the possession and apparent ownership of goods sold, will ordinarily be subject to any defenses which might have been used if the agent had sued for the price, and which the other party had acquired before he knew or had reason to believe that there was a principal in the case; but not to those acquired after such notice or knowledge.[22]

Payment to the agent stands upon substantially the same ground.[23]

Nat. Bank v. Burch (1892), 141 Ill. 519, 31 N. E. 420, 33 Am. St. R. 331; Honaker v. Board of Education (1896), 42 W. Va. 170, 24 S. E. 544, 57 Am. St. R. 847, 32 L. R. A. 413; Cassiday, etc. Co. v. Terry (1911), 69 W. Va. 572, 73 S. E. 278; Reitman v. Fiorillo (1908), 76 N. J. L. 815, 72 Atl. 74.

See also McCormick Harv. Mach. Co. v. Taylor (1895), 5 N. Dak. 53, 63 N. W. 590, 57 Am. St. R. 538; Johnston Harvester Co. v. Miller (1888), 72 Mich. 265, 40 N. W. 429, 16 Am. St. R. 536.

Compare Evans v. Ins. Co. (1906), 130 Wis. 189, 109 N. W. 952, 118 Am. St. R. 1009, 9 L. R. A. (N. S.) 485.

[22] See Rabone v. Williams (1785), 7 T. R. 360, note *a*, Wambaugh's Cas. 673; George v. Clagett (1797), 7 T. R. 359, Wambaugh's Cas. 674; Borries v. Imperial Bank (1873), L. R. 9 C. Pl. 38, Wambaugh's Cas. 678; Cooke v. Eshelby (1887), 12 App. Cas. 271, Wambaugh's Cas. 687; Montagu v. Forwood [1893], 2 Q. B. 350; Frazier v. Poindexter (1906), 78 Ark. 241, 95 S. W. 464, 115 Am. St. R. 33; Deane v. Glue Co. (1909), 200 Mass. 459, 86 N. E. 890; Stebbins v. Walker (1881), 46 Mich. 5, 8 N. W. 521, Wambaugh's Cas. 684; Baxter v. Sherman (1898), 73 Minn. 434, 76 N. W. 211, 72 Am. St. R. 631; Bernshouse v. Abbott (1883), 45 N. J. L. 531, 46 Am. Rep. 789; Winslow v. Staton (1909), 150 N. Car. 264, 63 S. E. 950; Hogen v. Klabo (1904), 13 N. Dak. 319, 100 N. W. 847; Belfield v. Nat'l Supply Co. (1899), 189 Pa. 189, 42 Atl. 131, 69 Am. St. R. 799.

"The buyer must be cautious, and not act regardless of the rights of the principal, though undisclosed, if he has any reasonable grounds to believe that the party with whom he deals is but an agent." Miller v. Lea (1872), 35 Md. 396, 6 Am. Rep. 417.

[23] See Traub v. Milliken (1869), 57 Me. 63, 2 Am. Rep. 14; Copeland v. Touchstone (1849), 16 Ala. 333, 50 Am. Dec. 181, Goddard's Cas. 797; Dean v. Plunkett (1884), 136 Mass. 195; Du Bois v. Perkins

§ 596. Principal may not sue where terms of contract exclude him.—It is held that the principal may not sue where the terms of the contract upon which he seeks to sue exclude him; as, *a.* Where the contract was in terms made with the agent alone as the only contracting party,[24] or, *b.* Where there is a contract in writing which contains such express statements or stipulations as to the attitude or relation of the parties that the undisclosed principal, in order to introduce himself as a party in interest, must begin by contradicting the contract.

The leading case on the second branch is one wherein an undisclosed principal sought to show that she was the *owner* of a certain vessel as to which her agent had made a charter, in which he expressly referred to himself as the owner.[25] It was held that the undisclosed principal might not maintain the action.

(1891), 21 Oreg. 189, 27 Pac. 1044; Rosser v. Darden (1888), 82 Ga. 219, 7 S. E. 919, 14 Am. St. R. 152.

[24] Elbinger Actien-Gesellschaft v. Claye (1873), L. R. 8 Q. B. 313, Wambaugh's Cas. 542, would be one instance of this class.

Kayton v. Barnett (1889), 116 N. Y. 625, 23 N. E. 24, Mechem's Cas. 553, Wambaugh's Cas. 652, referred to *ante* § 465, note, suggests another case. Might the defendant in that case have sued the plaintiff? Compare Winchester v. Howard (1867), 97 Mass. 303, 93 Am. Dec. 93, Goddard's Cas. 794; and Gordon v. Street, [1899] 2 Q. B. 641. See also Kelly, etc. Co. v. Barber, etc. Co. (1914), 211 N. Y. 68, 105 N. E. 88, L. R. A. 1915C, 256, where it was held that the undisclosed principal, in the absence of fraud, could sue even though the defendant contended that he would never have made the contract if the present principal had been disclosed, and that he was kept undisclosed for that reason.

[25] Humble v. Hunter (1848), 12 Q. B. 310, Wambaugh's Cas. 629. *Held*, to be still good law: Formby v. Formby (1910), 102 L. T. Rep. 116 (C. A.); Rederi, etc. Transatlantic v. Drughorn, [1918] 1 K. B. 394; Rederiaktiebolaget Argonaut v. Hani [1918], 2 K. B. 247. Followed: Crowder v. Yovovich (1917), 84 Oreg. 41, 164 Pac. 576.

See also Moore v. Cement Co. (1907), 121 N. Y. App. Div. 667, 106 N. Y. Supp. 393; Kelly Pav. Co. v. Barber Pav. Co. (1909), 136 N. Y. App. Div. 22, 120 N. Y. Supp. 163, aff'd 211 N. Y. 68, 105 N. E. 88, L. R. A. 1915C, 256, *supra;* Graves v. Ins. Co. (1805), 6 U. S. 418, 2 L. Ed. 324; Werlin v. Surety Co. (1917), 227 Mass. 157, 116 N. E. 484.

§ 597. —— Effect of fraud in procuring contract.—It is, of course, not fraud *per se* for an agent to make a contract without disclosing his principal.[26] Nor is it, even if the principal were kept concealed because of a belief that the other party might not be willing to make the contract if he knew that the concealed principal was interested.[27] But if there was active fraud in concealing the principal, or in inveigling the other party into a contract which he was known to be unwilling to make, the other party could doubtless have the contract rescinded.[28]

2. *Right to recover Money or Property.*

§ 598. Right to recover money wrongfully paid on principal's account.—Where money of the principal in the hands of his known agent, dealing on his principal's account, is obtained from the agent by a third person by fraud, deceit or coercion, or by a mistake of fact, or upon a consideration which fails, and the like, the principal may ordinarily recover it, under the same circumstances which would permit its recovery if it had been so obtained from the principal in person.[29]

As has been seen, the agent himself might also often maintain an action for its recovery.[30]

An undisclosed principal might also ordinarily recover here as in other cases.

§ 599. Right to recover money wrongfully appropriated or applied on the agent's account.—Where an agent wrongfully applies or appropriates the principal's money to the agent's own uses, the right of the principal to recover it from a third person who receives it, depends upon a variety of considerations. If the third person knows what is happening, as where he sees or has reason to believe that the agent is using the principal's money to pay the agent's debt to that third person, the latter can ordinarily not retain it.[31] If the third person did not know or have reason to believe it to be the principal's money, but received it in good faith and in the ordinary course of business, and certainly where he gave up something of value in return for it, such as relinquishing his security or formally discharging the debt, he could not be compelled to surrender it.[32]

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[26] See Standard Steel Car Co. v. Stamm (1904), 207 Pa. 419, 56 Atl. 954. There were other questions also in this case.

[27] See Kelly, etc. Co. v. Barber, etc. Co. (1914), 211 N. Y. 68, 105 N. E. 88, L. R. A. 1915C, 256.

[28] See Brett v. Cooney (1902), 75 Conn. 338, 53 Atl. 729; Panama, etc., Tel. Co. v. India Rubber, etc. Co. (1875), 10 Ch. App. 515; Kelly v. Railroad Co. (1888), 74 Cal. 557, 16 Pac. 386.

[29] See Stevenson v. Mortimer (1778), Cowp. 805; Norfolk v. Worthy (1808), 1 Camp. 337; Leigh v. Brakebeam Co. (1903), 205 Ill. 147, 68 N. E. 713; Demarest v. New Barbadoes (1878), 40 N. J. L. 604.

[30] See *ante* § 580.

§ 600. Right to recover negotiable instruments.—With respect of negotiable instruments, like promissory notes and bills of exchange, if they are payable to bearer or endorsed in blank, a transfer of them by the agent, though wrongful as to the principal, to one who takes them before dishonor, for value, and without notice, would cut off the principal's right to recover them.[33] If the transferee had notice, as where the creditor of the agent sees or knows that the agent is attempting to pay his own debt with the principal's securities, he could not hold them.[34]

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[31] See Hogg v. Snaith (1808), 1 Taunt. 347, Wambaugh's Cas. 269; Wolffe v. State (1885), 79 Ala. 201, 58 Am. Rep. 590; Gerard v. McCormick (1891), 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234; National Bank v. Insurance Co. (1881), 104 U. S. 54, 26 L. Ed. 693.

[32] See Justh v. National Bank (1874), 56 N. Y. 478; Newhall v. Wyatt (1893), 139 N. Y. 452, 34 N. E. 1045, 36 Am. St. R. 712; Holly v. Missionary Society (1899), 34 C. C. A. 649, 92 Fed. 745 (aff'd 180 U. S. 284, 21 Sup. Ct. 395, 45 L. Ed. 531; First Nat. Bank v. Gibert (1909), 123 La. 845, 49 So. 593; 131 Am. St. R. 382, 25 L. R. A. (N. S.) 631; Thompson v. Clydesdale Bank, [1893] App. Cas. 282.

But compare Porter v. Roseman (1905), 165 Ind. 255, 74 N. E. 1105, 112 Am. St. R. 222, 6 Ann. Cas. 718.

[33] See Bank v. Furniture Co. (1905), 57 W. Va. 625, 50 S. E. 880, 70 L. R. A. 312. A *bona fide* transferee who takes even from a thief or a finder is ordinarily protected in such cases.

[34] See Hogg v. Snaith, *supra*.

If the paper required endorsement, and the agent forged the endorsement, no title could ordinarily pass thereby as against the principal.

§ 601. Right to recover quasi-negotiable instruments.—There is a considerable number of instruments which are sometimes, though not very accurately, described as *quasi*-negotiable, such as bills of lading and certificates of stock. Although these are not negotiable in the strict sense under the common law,[35] yet even so, if the owner of such a document entrusted it to an agent, made out in the agent's name or endorsed in blank, for the purpose of enabling the agent to make some disposition thereof for the principal's benefit, and the agent, by virtue of his apparent interest or authority, made some other and unauthorized disposition of it, to one who took for value and without notice, the principal's right has frequently been held to be cut off.[36]

Statutes in various States have attempted to make these instruments negotiable,[37] and the Uniform Bills of Lading Act and the Uniform Stock Transfer Act, where adopted, have greatly increased the power of agents entrusted with the possession of such instruments in a transferable form to cut off the principal's right by an unauthorized transfer.[38]

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[35] See National Bank v. Railroad Co. (1904), 99 Md. 661, 59 Atl. 134, 105 Am. St. R. 321; East Birmingham Land Co. v. Dennis (1888), 85 Ala. 565, 5 So. 317, 7 Am. St. R. 73, 2 L. R. A. 836.

[36] See Commercial Bank v. Armsby (1904), 120 Ga. 74, 47 S. E. 589, 65 L. R. A. 443 (bill of lading); McNeil v. Tenth Nat. Bank (1871), 46 N. Y. 325, 7 Am. Rep. 341 (stock certificate).

See also Rogers v. Dutton (1902), 182 Mass. 187, 65 N. E. 66; Scollans v. Rollins (1901), 179 Mass. 346, 60 N. E. 983, 88 Am. St. R. 386; Shattuck v. Cement Co. (1903), 205 Pa. 197, 54 Atl. 785, 97 Am. St. R. 735; Brittan v. Oakland Bank (1899), 124 Cal. 282, 57 Pac. 84, 71 Am. St. R. 58; McCarthy v. Crawford (1909), 238 Ill. 38, 86 N. E. 750, 128 Am. St. R. 95, 29 L. R. A. (N. S.) 252.

Not so, where it had not been entrusted to the agent for any purpose of disposition, but merely for custody. See Knox v. Eden Musee Co. (1896), 148 N. Y. 441, 42 N. E. 988, 51 Am. St. R. 700, 31 L. R. A. 779.

See also American Exchange Nat. Bank v. Woodlawn Cemetery (1909), 194 N. Y. 116, 87 N. E. 107.

[37] See Shaw v. Railroad Co. (1870), 101 U. S. 557, 25 L. Ed. 892; National Bank v. Railroad Co. (1890), 44 Minn. 224, 46 N. W. 342, 560, 20 Am. St. R. 566, 9 L. R. A. 263.

§ 602. Right to recover other property.—With respect of ordinary chattels, the rule is more clear. Generally no one can transfer a better title to such property than he himself has, even to a purchaser for value and without notice.[39] Mere possession of such property does not raise a sufficient inference of ownership or of unlimited power of disposition.

If, however, the principal has, in addition to possession, clothed the agent with the ordinary evidences of ownership, as by allowing the title to stand upon the public records in the agent's name,[40] or by allowing him to have a bill of sale of it in his own name,[41] and the like; or if he gives him an apparent authority to sell, as, it is said, where the principal sends his property to the place of business of one whose ordinary business at that place is to sell such property,[42] a purchaser in good faith, for value and without notice will be protected, even though the sale were in fact unauthorized.

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[38] About twenty-five States had, in 1922, adopted the Bills of Lading Act, and about fifteen had adopted the Stock Transfer Act.

[39] See Saltus v. Everett (1838), 20 Wend. (N. Y.) 267, 32 Am. Dec. 541; Barker v. Dinsmore (1872), 72 Pa. 427, 13 Am. Rep. 697; Quinn v. Davis (1875), 78 Pa. 15; Edwards v. Dooley (1890), 120 N. Y. 540, 24 N. E. 827; Anderson v. Patten (1912), 157 Iowa 23, 137 N. W. 1050; Gussner v. Hawks (1904), 13 N. Dak. 453, 101 N. W. 898.

If an agent buys property for his principal, the title will ordinarily vest in the principal, and if the agent then wrongfully sells it as his own, a buyer who relies merely on the agent's possession will not be protected: Edwards v. Dooley (1890), 120 N. Y. 540, 24 N. E. 827; Gussner v. Hawks, *supra.*

[40] See Barrett v. King (1902), 181 Mass. 476, 63 N. E. 934.

[41] See Nixon v. Brown (1876), 57 N. H. 34.

See also Williams v. Ashe (1896), 111 Cal. 180, 43 Pac. 595; Dean v. Plunkett (1884), 136 Mass. 195, Goddard's Cas. 804.

[42] See Pickering v. Busk (1812), 15 East 38, Goddard's Cas. 319, Wambaugh's Cas. 272; Heath v. Stoddard (1898), 91 Me. 499, 40 Atl. 547; Carter v. Rowley (1922),

§ 603. —— One who had notice of the agency, however, would not be protected if the agent, without authority from his principal, should attempt to use the principal's property to pay the agent's own debt to that person.[43] And the general creditors of the agent who levy upon, attach or garnish the principal's property to satisfy the debt of the agent may not hold it against the principal. They are not purchasers for value.[44] Even though they extended credit believing the property to be the agent's merely from his possession of it, they could not hold it.

§ 604. —— **Factors' acts.**—Statutes in England and in a number of States, commonly known as Factors' Acts, have for their purpose the protection of pledgees and other transferees who have relied upon the apparent ownership or power of disposition of factors and other commercial agents, to whom goods or the documentary evidence of title to goods have been entrusted by the owner.[45]

— Cal. App. —, 211 Pac. 267 (where sending automobile to a salesroom for used cars was held to justify an inference that this one was sent there for sale).

But compare Biggs v. Evans [1894], 1 Q. B. 88, Wambaugh's Cas. 355; Gilman Oil Co. v. Norton (1893), 89 Iowa 434, 56 N. W. 663, 48 Am. St. R. 400.

See also Smith v. Clews (1887), 105 N. Y. 283, 11 N. E. 632, 59 Am. Rep. 502, s. c. 114 N. Y. 190, 21 N. E. 160, 11 Am. St. R. 627, 4 L. R. A. 392; Levi v. Booth (1882), 58 Md. 305, 42 Am. Rep. 332; Baehr v. Clark (1891), 83 Iowa 313, 49 N. W. 840, 13 L. R. A. 717; Quinn v. Davis (1875), 78 Pa. 15.

[43] See Hogg v. Snaith, *supra;* Stewart v. Woodward (1877), 50 Vt. 78, 28 Am. Rep. 488, Wambaugh's Cas. 342 (agent attempting to pay his own debt with goods from principal's store); Burks v. Hubbard (1881), 69 Ala. 379; Baker v. New York Nat. Bank (1885), 100 N. Y. 31, 2 N. E. 452, 16 Abb. N. C. 458, 53 Am. Rep. 150, Mechem's Cas. 596; First Nat. Bank v. Taliaferro (1890), 72 Md. 164, 19 Atl. 364; Grooms v. Harness Co. (1906), 79 Ark. 401, 96 S. W. 135; Fisher v. Brown (1870), 104 Mass. 259, 6 Am. Rep. 235.

[44] See Loomis v. Barker (1873), 69 Ill. 360; Greene v. Haskell (1858), 5 R. I. 447; Gage v. Stimson (1879), 26 Minn. 64, 1 N. W. 806; Farmers', etc. Bank v. King (1868), 57 Pa. 202, 98 Am. Dec. 215, Mechem's Cas. 590.

[45] Statutes of this sort, differing more or less in details, are to

§ 605. Right to follow property or money into other forms.—If the agent, in violation of his duty, has invested his principal's property or money in other forms of property or funds, the principal may follow and recover it or its proceeds, through any number of hands, and notwithstanding changes of form, as long as he can trace it and until it comes into the hands of a purchaser for value without notice.[46]

In the distribution of the assets of an insolvent agent, the principal who could trace his property or funds would prevail over the general creditors of the agent.[47]

§ 606. Right to rescind dealings and recover property, etc., where agent secretly in employment of other party.—As has been seen, an agent cannot, consistently with his duty, undertake to represent his principal where he is at the same time secretly in the employment of the other party.[48] Where, therefore, he was thus at the same time secretly in the employment of the other party, the principal is not absolutely bound, and he may, if he so elects, rescind dealings with the other party and recover from him what he has parted with to him.

As has been seen also, it is not necessary for the principal in such a case to show that he has been injured or that the agent has in fact betrayed his interests; his right to repudiate the transaction is absolute, provided he acts promptly and before the rights of innocent third parties have intervened.[49]

be found, for example, in New York, Maine, Maryland, Massachusetts, Ohio, Pennsylvania, and Rhode Island.

[46] See Roca v. Byrne (1895), 145 N. Y. 182, 39 N. E. 812, 45 Am. St. R. 599; Midland National Bank v. Brightwell (1898), 148 Mo. 358, 49 S. W. 994, 71 Am. St. R. 608; First Nat. Bank v. Hummel (1890), 14 Colo. 259, 23 Pac. 986, 20 Am. St. R. 257, 8 L. R. A. 788; Gerard v. McCormick (1891), 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234; Dorrah v. Hill (1896), 73 Miss. 787, 19 So. 961, 32 L. R. A. 631; Stevenson v. Kyle (1896), 42 W. Va. 229, 24 S. E. 886, 57 Am. St. R. 854; Pearce v. Dill (1897), 149 Ind. 136, 48 N. E. 788, Goddard's Cas. 801.

[47] See Farmers', etc. Bank v. King (1868), 57 Pa. 202, 98 Am. Dec. 215, Mechem's Cas. 590.

[48] See *ante* § 298.

[49] See New York Cent. Ins. Co. v. National Ins. Co. (1856), 14 N. Y. 85; United States Rolling Stock Co. v. Atlantic R. Co. (1878), 34 Ohio St. 450, 32 Am. Rep. 380.

§ 607. Right to rescind against third person who has colluded with his agent to defraud him.—The principal may doubtless also rescind dealings which result from a collusion of the other party and the agent to defraud the principal. That an action at law to recover damages for the loss caused by such collusion, may be maintained, will be seen in a later section;[50] but the action for rescission would ordinarily be an alternative remedy.[51]

Fraud in imposing upon the principal a party with whom it was known that he was unwilling to deal, may also justify a rescission.

3. *Right to recover for Torts.*

§ 608. Principal may recover for injuries to him by third person.—For wrongs done or injuries committed by third persons to the property or interests of the principal which he has committed to his agent, the principal may ordinarily recover as though no agency existed. He has the title and usually the right to possession. He may maintain actions of replevin,[52] trover,[53] or trespass[54] in an appropriate case. Deceit or misrepresentation practiced upon the agent while acting for the principal by which the principal is injured, will justify an action by the principal.[55] For a loss or injury by a bailee or carrier of the principal's property, the principal may ordinarily recover.[56]

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[50] See *post* § 609.

[51] See Panama, etc. Co. v. India Rubber Co. (1875), 10 Ch. App. 515.

[52] See White v. Dolliver (1873), 113 Mass. 400, 18 Am. Rep. 502.

[53] See Gilmore v. Newton (1864), 91 Mass. (9 Allen) 171, 85 Am. Dec. 749, Goddard's Cas. 807.

[54] See Holly v. Huggeford (1829), 25 Mass. (8 Pick.) 73, 19 Am. Dec. 303.

[55] See Perkins v. Evans (1883), 61 Iowa 35, 15 N. W. 584; Pattison v. Barnes (1866), 26 Ind. 209, Goddard's Cas. 806.

Not if made before the agency began: Moore v. Haviland (1888), 61 Vt. 58.

[56] See Central Ry. Co. v. James (1903), 117 Ga. 832, 45 S. E. 223.

§ 609. Right to recover damages for collusion.—The principal may also recover damages from third persons who have conspired or colluded with his agent to defraud him; and he may recover money which such persons have obtained from him by means of such collusion, or he may defeat a recovery against himself by showing such collusion.[57]

The fact that the agent also may be liable in such a case, does not release the third party who has actively participated in the wrongful act.[58]

§ 610. Recovery for enticing agent away, disabling him, etc.—The principal may also maintain actions of tort against third persons who maliciously entice his agent to break his contract of service, or who maliciously arrest or imprison him so as to prevent him from performing, or who wilfully or negligently so injure him as to disable him from performing the service, to the principal's consequent loss.[59]

[57] See Boston v. Simmons (1890), 150 Mass. 461, 23 N. E. 210, Mechem's Cas. 598, 15 Am. St. R. 230, 6 L. R. A. 629; Mayor of Salford v. Lever [1891], 1 Q. B. Div. 168, Mechem's Cas. 601; City of Findlay v. Pertz (1895), 13 C. C. A. 559, 66 Fed. 427, 29 L. R. A. 188; Glaspie v. Keator (1893), 5 C. C. A. 474, 56 Fed. 203; Shipway v. Broadwood [1899], 1 Q. B. 369; Grant v. Gold Syndicate [1900], 1 Q. B. 233.

[58] See Guernsey v. Davis (1903), 67 Kan. 378, 73 Pac. 101.

[59] See Haskins v. Royster (1874), 70 N. C. 601, 16 Am. Rep. 780; St. Johnsbury R. R. Co. v. Hunt (1882), 55 Vt. 570, 45 Am. Rep. 639, Mechem's Cas. 608; O'Neil v. Behanna (1897), 182 Pa. 236, 37 Atl. 843, 61 Am. St. R. 702, 38 L. R. A. 382 (injunction); Doremus v. Hennessy (1898), 176 Ill. 608, 52 N. E. 924, 54 N. E 524, 68 Am. St. R. 203, 43 L. R. A. 797, 802; Jones v. Blocker (1871), 43 Ga. 331, Goddard's Cas 809; Walker v. Cronin (1871), 107 Mass. 555.

Sayre, 36 Harvard Law Review, 663.

CHAPTER XVIII.

OF SPECIAL CLASSES OF AGENTS.

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§ 611. In general.—Some attention has already been given (§§ 32-36) to certain classes of professional agents—*i. e.*, persons whose business or profession it is to act for others in certain capacities. Some further attention to these special classes of agents seems here desirable. The most important of them, as already observed, are the Attorney at Law, the Auctioneer, the Broker, and the Factor.

1. *Of Attorneys At Law.*

§ 612. Relation of attorney to client.—The attorney at law is an officer of the court in which he practices, and is, in some sense, an officer of the State. But the relation of the attorney to his client, in some of its aspects, is a relation of agency, and is, in general, governed by the same rules which apply to other agencies. It is this side of it only which is considered here.

§ 613. How appointed.—No formal authorization is ordinarily necessary, but the attorney's authority may be shown by the same kind of evidence which would suffice in other cases. It may, for example, be inferred from conduct, and a subsequent ratification may cure the lack of precedent authorization.

Moreover, when a duly admitted attorney appears for a party in a cause, the law presumes that his appearance was authorized; and while this presumption is not conclusive, it will suffice until some showing is made to the contrary, and then the attorney may be required to produce his authority.

Proceedings taken in reliance upon such an appearance are, by some courts, also presumed to be valid, and only to be impeached upon a direct attack. If the principal is injured by the application of this rule to proceedings really unauthorized, it is said that he has a remedy against the attorney.[1] Other courts permit a showing to be made, even in collateral proceedings, that there was no authority.[2]

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[1] See Corbitt v. Timmerman (1893), 95 Mich. 581, 55 N. W. 437, 35 Am. St. R. 586; Cochran v. Thomas (1895), 131 Mo. 258, 33 S. W. 6; Williams v. Johnson (1893), 112 N. Car. 424, 17 S. E. 496, 34 Am. St. R. 513, 21 L. R. A. 848; Deegan v. Deegan (1894), 22 Nev. 185, 37 Pac. 360, 58 Am. St. R. 742; Sanders v. Price (1899), 56 S. Car. 1, 33 S. E. 731.

[2] See Hess v. Cole (1851), 23 N.

§ 614. **Duration of relation.**—The general retainer of an attorney to conduct a cause is presumed to be an entire contract on his part for the whole suit, and he may not lawfully abandon the case before its termination without just cause and reasonable notice. But on the part of the client, the engagement, in the absence of an agreement to the contrary, is deemed to be at will merely, and he may discharge the attorney at any time upon paying him for services already rendered.[3]

Where there is a definite contract respecting the duration, or the rights of the attorney, then, although the client may terminate the attorney's authority to proceed further, he will be liable to the attorney for the breach of the contract if he terminates the relation without sufficient cause.[4]

§ 615. **Implied authority of attorney.**—An attorney at law employed to conduct a case has implied authority to control the conduct and management of the cause, and to do all the things which are necessary or incidental to the prosecution or defense of the cause, and which affect the remedy only and not the right of action. His acts and stipulations, therefore, which affect the practice or procedure only will bind his client; but he has no implied authority to compromise or release his client's cause of action, release liens, levies, or securities, grant extensions of time on contracts or obligations, or waive or give up the substantial rights of his client.[5] He may receive pay-

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J. L. 116; Parker v. Spencer (1884), 61 Tex. 155; Reynolds v. Fleming (1883), 30 Kan. 106, 46 Am. Rep. 86, Mechem's Cas. 615; Green v. Green (1889), 42 Kan. 654, 22 Pac. 730, 16 Am. St. R. 510; Kepley v. Irwin (1883), 14 Neb. 300, 15 N. W. 719; Anderson v. Hawhe (1885), 115 Ill. 33, 3 N. E. 566.

[3] See Tenney v. Berger (1883), 93 N. Y. 524, 45 Am. Rep. 263; Underwood v. Lewis (1894), 2 Q. B. 306.

[4] See Weil v. Finneran (1902), 70 Ark. 509, 69 S. W. 310; French v. Cunningham (1897), 149 Ind. 632, 49 N. E. 797; Webb v. Trescony (1888), 76 Cal. 621, 18 Pac. 796; Bartlett v. Savings Bank (1889), 79 Cal. 218, 21 Pac. 743, 12 Am. St. R. 139; Scheinesohn v. Lemonek (1911), 84 Ohio St. 424, 95 N. E. 913, Ann. Cas. 1912C, 737

[5] See Moulton v. Bowker (1894), 115 Mass. 36, 15 Am. Rep. 72, Mechem's Cas. 619; Kirk's Appeal (1878), 87 Penn. 243, 30

ment of the claim, either before or after judgment, and may take the necessary steps to enforce the judgment; but he may not release the judgment without payment in full, or assign it, or receive anything but money in payment.[6]

As in the case of other agents, his client may continue to be bound by his acts after a discharge unless notice of that fact be given.[7]

§ 616. Attorney bound to utmost loyalty and honor.—The attorney is bound to exercise the highest honor and integrity towards his client; not to take his case if he has any adverse interest, either of his own or of some other person, which will prevent his giving his individual allegiance to his client; and, having entered upon the relationship, to maintain at all times the utmost loyalty to his client's interests.[8]

Am. Rep. 357; Mechem's Cas. 621; Nichells v. Nichells (1895), 5 N. Dak. 125, 64 N. W. 73, 57 Am. St. R. 540, 33 L. R. A. 515; Smith v. Jones (1896), 47 Neb. 108, 66 N. W. 19, 53 Am. St. R. 519; Gardner v. Mobile R. Co. (1893), 102 Ala. 635, 15 So. 271, 48 Am. St. R. 84; Garrett v. Hanshue (1895), 53 Ohio St. 482, 42 N. E. 256, 35 L. R. A. 321; Bonney v. Morrill (1869), 57 Me. 368; Union Mut. L. Ins. Co. v. Buckman (1884), 100 Ind. 63; Dalton v. Railway Co. (1893), 159 Mass. 221, 34 N. E. 261, 38 Am. St. R. 410; Anglo-Amer. etc. Co. v. Dyer (1902), 181 Mass. 593, 64 N. E. 416, 92 Am. St. R. 437; Fleishman v. Meyer (1905), 46 Oreg. 267, 80 Pac. 209; Brockley v. Brockley (1888), 122 Pa. 1, 15 Atl. 646; Beliveau v. Amoskeag Co. (1894), 68 N. H. 225, 40 Atl. 734, 44 L. R. A. 167.

There is much dispute about the implied authority of an attorney to compromise the claim, or to confess judgment against his client, or to submit the claim to arbitration.

[6] See Smith v. Kidd (1877), 68 N. Y. 130, 23 Am. Rep. 157; Cram v. Sickel (1897), 51 Neb. 828, 71 N. W. 724, 66 Am. St. R. 478; Watt v. Brookover (1891), 35 W. Va. 323, 13 S. E. 1007, 29 Am. St. R. 811; Hendry v. Benlisa (1896), 37 Fla. 609, 20 So. 800, 34 L. R. A. 283; State v. Ballinger (1905), 41 Wash. 23, 82 Pac. 1018, 3 L. R. A. (N. S.) 72.

[7] See Beliveau v. Amoskeag Co. (1894), 68 N. H. 225, 40 Atl. 734, 44 L. R. A. 167.

[8] See Strong v. International Building Union (1899), 183 Ill. 97, 55 N. E. 675, 47 L. R. A. 792; Darlington's Estate (1892), 147 Pa. 624, 23 Atl. 1046, 30 Am. St R. 776; Cox v. Sullivan (1849), 7 Ga. 144, 50 Am. Dec. 386; San-

Like other agents also, he must absolutely refrain from permitting his own interests to conflict with those of his client. He may not buy his client's property at sales made in the progress of the proceedings or litigation in which he is concerned, except with the full and intelligent consent of his client. He may not profit by his own defaults, or take advantage of his information or situation to make gains for himself, at his client's expense.[9] He may not purchase, and hold adversely, the subject matter of the controversy. If he violates his duty in any of these respects, his client may charge him as a trustee.

§ 617. Dealings between attorney and client.—Dealings between attorney and client, such as the purchase of the client's property by the attorney, the sale of the attorney's property to the client, and the like, are, by reason of the position of the parties, justly subject to the suspicion of an undue influence. This is especially true of alleged gifts from the client to the attorney.

In order to be upheld, all dealings between the parties must be characterized by the utmost fairness and good faith. Some cases hold transfers from the client to the attorney to be absolutely voidable at the option of the client; but the true rule seems to be that, while they will be scrutinized with great strict-

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guinetti v. Rossen (1906), 12 Cal. App. 623 (where the court says that "an attorney at law should be a paragon of candor, fairness, honor and fidelity in all his dealings with those who place their trust in his ability and integrity, and he will at all times and under all circumstances be held to the full measure of what he ought to be"); Peirce v. Palmer (1910), 31 R. I. 432, 77 Atl. 201; Pilling v. Benson (1912), 34 R. I. 519, 84 Atl. 1005.

[9] See Olson v. Lamb (1898), 56 Neb. 104, 76 N. W. 433, 71 Am. St. R. 670; Eoff v. Irvine (1891), 108 Mo. 378, 18 S. W. 907, 32 Am. St. R. 609; Baker v. Humphrey (1879), 101 U. S. 494, 25 L. Ed. 1065; Cunningham v. Jones (1887), 37 Kan. 477, 15 Pac. 572, 1 Am. St. R. 257; Davis v. Kline (1888), 96 Mo. 401, 9 S. W. 724, 2 L. R. A. 78; Roberts v. Gates (1906), 146 Mich. 169, 109 N. W. 264; Bucher v. Hohl (1906), 199 Mo. 320, 97 S. W. 922, 116 Am. St. R. 492. Compare Rogers v. Gaston (1890), 43 Minn. 189, 45 N. W. 427; Butcher v. Chidester (1910), 68 W. Va. 488, 69 S. E. 1009.

ness, they will be upheld if they are entirely fair and voluntary, but of this the attorney has the burden of proof.[10]

§ 618. Confidential communications privileged.—All disclosures and communications made by the client to his attorney, during and under the confidence of the relation, and all information received by the attorney from the client or from his books or papers, and of a confidential nature, are "privileged," and the attorney will not be permitted to disclose them without the consent of his client.[11] The operation of the privilege is perpetual, and survives not only the relation of attorney and client, but the lives of the attorney and client as well.[12] It can only be removed when it becomes necessary for the attorney's own protection against his client,[13] or for the furtherance of public justice, as where the client consults the attorney with reference to a proposed commission of crime.[14] Past crimes, committed before the attorney was consulted, would be under the protection of the privilege.

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[10] See Kidd v. Williams (1901), 132 Ala. 140, 31 So. 458, 56 L. R. A. 879; Cooley v. Miller (1909), 156 Cal. 510, 105 Pac. 981; Elmore v. Johnson (1892), 143 Ill. 513, 32 N. E. 413, 36 Am. St. R. 401, 21 L. R. A. 366; Mitchell v. Colby (1895), 95 Iowa 202, 63 N. W. 769; Merryman v. Euler (1882), 59 Md. 588, 43 Am. Rep. 564; Crocheron v. Savage (1909), 75 N. J. Eq. 589, 73 Atl. 33, 23 L. R. A. (N. S.) 679; Hamilton v. Allen (1910), 86 Neb. 401, 125 N. W. 610, 28 L. R. A. (N. S.) 723; Young v. Murphy (1903), 120 Wis. 49, 97 N. W. 496; Hetrick v. Smith (1912), 67 Wash. 664, 122 Pac. 563; James v. Steere (1888), 16 R. I. 367, 16 Atl. 143, 2 L. R. A. 164; Stout v. Smith (1885), 98 N. Y. 25, 50 Am. Rep. 632, Mechem's Cas. 628; Barron v. Willis [1900], 2 Ch. 121.

[11] This subject is now frequently regulated by statutes, but the statutes generally follow the main lines worked out by the courts. See White v. State (1888), 86 Ala. 69; Gabriel v. McMullin (1905), 127 Iowa 426, 103 N. W. 355; Selden v. State (1889), 74 Wis. 271, 42 N. W. 218, 17 Am. St. R. 144; Butler v. Fayerweather (1899), 33 C. C. A. 625, 91 Fed. 458; O'Brien v. Spalding (1897), 102 Ga. 490, 31 S. E. 100, 66 Am. St. R. 202; Foster v. Hall (1831), 29 Mass. (12 Pick.) 89, 22 Am. Dec. 400.

[12] Thus, the representatives of the attorney, after his death, would not be permitted to disclose papers or other information which he could not have disclosed.

[13] See Mitchell v. Bromberger (1866), 2 Nev. 345, 90 Am. Dec. 550.

[14] See Orman v. State (1886),

§ 619. —— The privilege is the privilege of the client, and not of the attorney;[15] and it may be waived by the client.[16]

It exists only when the communication can fairly be regarded as confidential,[17] and the relation of attorney and client must exist.[18]

Where several persons employ the same attorney in the same matter, their communications are privileged as to third persons, but not in a controversy between themselves.[19]

§ 620. Liability of attorney to client.—The attorney impliedly agrees with his client that he possesses and will exercise a reasonable degree of professional knowledge, skill and

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22 Tex. App. 604, 58 Am. Rep. 662; People v. Van Alstine (1885), 57 Mich. 69, 23 N. W. 594. Compare Supplee v. Hall (1902), 75 Conn. 17, 52 Atl. 407, 96 Am. St. R. 188, (contemplated fraud not within this exception).

[15] See Brooks v. Holden (1900), 175 Mass. 137, 55 N. E. 802.

[16] See Brooks v. Holden, *supra;* Phillips v. Chase (1909), 201 Mass. 444, 87 N. E. 755, 131 Am. St. R. 406.

[17] Casual conversations, statements made openly in the presence of other persons, or when the circumstances otherwise rebut the presumption of confidence, are not included. See Thompson v. Kilborne (1856), 28 Vt. 750, 67 Am. Dec. 742; Ferguson v. McBean (1891), 91 Cal. 63, 27 Pac. 518, 14 L. R. A. 65; House v. House (1886), 61 Mich. 69, 27 N. W. 858, 1 Am. St. R. 570; Michael v. Foil (1888), 100 N. Car. 178, 6 S. E. 264, 6 Am. St. R. 577; Champion v. McCarthy (1907), 228 Ill. 563, 81 N. E. 808, 10 Ann. Cas. 517, 11 L. R. A. (N. S.) 1052.

[18] See Union Pac. R. Co. v. Day (1904), 68 Kan. 726, 75 Pac. 1021. It is not, however, necessary that there should be any *formal* retainer, or that a fee shall be paid: Bruley v. Garvin (1909), 105 Wis. 625, 81 N. W. 1038, 48 L. R. A. 839; State v. Herbert (1901), 63 Kan. 516, 66 Pac. 236.

Communications to a law student are not privileged: Schubkagel v. Dierstein (1890), 131 Pa. 46, 18 Atl. 1059, 6 L. R. A. 481.

[19] See Seip's Estate (1894), 163 Pa. 423, 30 Atl. 226, 43 Am. St. R. 803; Haley v. Eureka County Bank (1891), 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815.

One may not waive for the other: Herman v. Schlesinger (1902), 114 Wis. 382, 90 N. W. 460.

diligence. He does not agree that he knows all the law, and will make no mistakes, or commit no errors of judgment; but he will be liable if he is ignorant of the well settled rules of law or practice, from which his client sustains injury.[20]

The attorney may hold himself out as possessing more than ordinary skill, and, if he does, his responsibility may be measured accordingly.

He will also be liable to his client for losses sustained by him, caused by the failure of the attorney to exercise reasonable care, skill and diligence in performing the service he has undertaken, such as collecting claims, bringing suit, trying the cause, examining titles, preparing contracts, and the like.[21]

The degree of diligence which would satisfy an ordinary case may be insufficient, where the attorney undertakes the service with knowledge that unusual diligence or promptness is requisite to the accomplishment of the desired object in that particular case.

The fact that he was acting gratuitously will ordinarily be no excuse for negligence in performing what he had undertaken.[22]

He is usually liable for the negligence and defaults of his partners and clerks in the same manner as for his own.[23]

§ 621. **Liability of attorney to third persons.**—The attorney is not liable to third persons for the neglect of duties which he owes to his client only.[24] Thus, it has been held that he is not liable to a third person who, in fact, relied upon and was misled by a defective examination of title, made for the client, and without employment by or reference to such third person.[25] So it has been held that a disappointed legatee under a will drawn by the attorney at the request of his client, could not recover damages from the attorney for his alleged negligence in so drafting the will that the legacy failed.[26]

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[20] See Cochrane v. Little (1889), 71 Md. 323, 18 Atl. 698; Citizens', etc., Ass'n v. Friedley (1889), 123 Ind. 143, 23 N. E. 1075, 18 Am. St. R. 320, 7 L. R. A. 669; Babbitt v. Bumpus (1887), 73 Mich. 331, 41 N. W. 417, 16 Am. St. R. 585; Goodman v. Walker (1857), 30 Ala. 482, 68 Am. Dec. 134.

[21] See Stevens v. Walker (1870), 55 Ill. 151; Waln v. Beaver (1894), 161 Pa. 605, 29 Atl. 114, 493; Drury v. Butler (1898), 171 Mass. 171, 50 N. E. 527; Forrow v. Arnold (1900), 22 R. I. 305, 47 Atl. 693.

[22] See Lawall v. Groman (1897), 180 Pa. 532, 37 Atl. 98, 57 Am. St. R. 662.

[23] See Livingston v. Cox (1847), 6 Pa. 360; Walker v. Stevens (1875), 79 Ill. 193.

[24] See Atwell v. Jenkins (1895), 163 Mass. 362, 40 N. E. 178, 28 L. R. A. 694.

§ 622. —— So the attorney is not liable ordinarily to third persons upon the contracts which he makes for his client, where his agency is disclosed, and the attorney does not pledge his personal responsibility.[27] He may, however, make himself liable in such a case if he extends his personal credit, and it frequently becomes a question of fact as to whether or not he has done so.[28] The rules governing similar questions in other cases are usually applicable here.

He is frequently held personally responsible, unless he has clearly excluded his own liability, for the clerk's and sheriff's fees for issuing and serving process at his request.[29]

§ 623. —— He will not ordinarily be liable to third persons who may be injured by malicious or wrongful actions instituted by his client in which he was merely the attorney; but he will be liable if he shares and aids his client's malice, or if he acts from malice of his own. He will also be liable, with his client, where he directs the service of void or illegal process. He will not ordinarily be liable for the excesses or misconduct of the officer who serves the process, unless he directed or participated in them.[30]

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[25] See Savings Bank v. Ward (1879), 100 U. S. 195, 25 L. Ed. 621; Houseman v. Girard Ass'n (1876) 81 Pa. 256; Dundee Mortg. & Trust Co. v. Hughes (1884), 20 Fed. 39.

[26] See Buckley v. Gray (1895), 110 Cal. 339, 42 Pac. 900, 52 Am. St. R. 88, 31 L. R. A. 862.

[27] See Covell v. Hart (1878), 14 Hun (N. Y.) 252, Wambaugh's Cas. 545; Russell v. Ferguson (1905), 77 Vt. 433, 60 Atl. 802.

[28] See as to expense of printing briefs, etc: Argus Co. v. Hotchkiss (1907), 121 N. Y. App. Div. 378, 107 N. Y. Supp. 138; Cameron Sun v. McAnaw (1897), 72 Mo. App. 196; Trimmier v. Thompson (1893), 41 S. Car. 125, 19 S. E. 291.

Where he acts for an insane client, see Yonge v. Toynbee [1910], 1 K. B. 215; for a non-existing principal: Attleboro Nat. Bank v. Wendell, 64 Hun (N. Y.) 208.

[29] See Heath v. Bates (1881), 49 Conn. 342, 44 Am. Rep. 234; Tilton v. Wright (1882), 74 Me. 214, 43 Am. Rep. 578; Judson v. Gray (1854), 11 N. Y. 408.

§ 624. Attorney's right to compensation.—Unless he has undertaken to serve gratuitously, the attorney is entitled to compensation for his lawful services. The amount to be paid may be fixed by the contract of the parties if fairly made, or it may be left to be determined according to the usages prevailing, if any, and if none, then according to the reasonable value of the service rendered.[31]

§ 625. —— Contingent compensation.—A contract for compensation contingent upon success is generally regarded as valid; and, in most States, it is no less valid because the attorney is to receive as his compensation a portion of the money or thing recovered, if the contract was fairly made and is not extortionate or oppressive.[32] Some courts have deemed such a contract champertous, but it is now generally agreed that it is not so, unless the attorney was also to carry on the suit at his own expense.

In a number of States, statutes exist respecting the right of the parties to agree upon the matter of the attorney's compensation.

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[30] See Peck v. Chouteau (1886), 91 Mo. 138, 60 Am. Rep. 236; Cook v. Hopper (1871), 23 Mich. 511; Burnap v. Marsh (1852), 13 Ill. 535; Smith v. Gayle (1877), 58 Ala. 600; Hardy v. Keeler (1870), 56 Ill. 152.

[31] See Davis v. Webber (1899), 66 Ark. 190, 49 S. W. 822, 45 L. R. A. 196; Russell v. Young (1889), 36 C. C. A. 71, 94 Fed. 45; Bartlett v. Savings Bank (1889), 79 Cal. 218, 21 Pac. 743, 12 Am. St. R. 139.

None where contract illegal, as for services in defending proposed crimes: Bowman v. Phillips (1889), 41 Kan. 364, 21 Pac. 230, 13 Am. St. R. 292, 3 L. R. A. 631.

[32] See Stanton v. Embrey (1876), 93 U. S. 548, 23 L. Ed. 983, Mechem's Cas. 631; Duke v.

§ 626. —— How reasonable value shown.—When no amount has been agreed upon, the attorney is entitled to recover the reasonable value of his services, and, for the purpose of proving this, he may call other lawyers as witnesses to give their opinion, though, of course, their opinions are not conclusive. In such cases the nature and difficulty of the matter, the amount involved, and the character and standing of the attorney, may be considered in determining the value.[33]

§ 627. Attorney entitled to reimbursement and indemnity.—The attorney is also entitled to reimbursement for such necessary and legitimate expenses as were properly incurred on the client's account, and were not covered by the compensation to be paid; and to indemnity for any liability properly incurred in his client's behalf.[34]

He is, of course, not entitled to either, if the disbursement or liability was caused by his own default or breach of duty.

§ 628. Attorney's lien.—For the purpose of securing the payment of his costs and charges, the attorney is entitled to a lien. This lien is of two kinds:

1. A *general* or *retaining* lien which entitles him to *retain* any papers, property or money of his client coming into the attorney's hands in his professional capacity, until his claim is paid; and this lien, by the weight of modern authority, secures the general balance of his account.

2. A *special* or *charging* lien, which exists in most States and which attaches, not to the cause of action, but to the judg-

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Harper (1877), 66 Mo. 51, 27 Am. Rep. 314; Blaisdell v. Ahern (1887), 144 Mass. 393, 59 Am. Rep. 99; Perry v. Dicken (1884), 105 Pa. 83, 51 Am. Rep. 181.

[33] See Stanton v. Embrey, *supra;* Eggleston v. Boardman (1877), 37 Mich. 14; Louisville, etc., R. Co. v. Wallace (1891), 136 Ill. 87, 26 N. E. 493, 11 L. R. A. 787; Selover v. Bryant (1893), 54 Minn. 434, 56 N. W. 58, 40 Am. St. R. 349, 21 L. R. A. 418; Ward v. Kohn (1893), 7 C. C. A. 314, 58 Fed. 462; Davis v. Webber (1899), 66 Ark. 190, 49 S. W. 822, 45 L. R. A. 196.

[34] See Clark v. Randall (1859), 9 Wis. 135, 76 Am. Dec. 252; Sibley v. Rice (1899), 58 Neb. 785, 79 N. W. 711; Hughes v. Zeigler (1873), 69 Ill. 38.

ment, money or property recovered by the services of the attorney, and secures the payment of his costs and charges in that particular suit.[35]

In many States the attorney's lien is regulated by statutes which frequently differ from the common law rules.

2. *Of Auctioneers.*

§ 629. **How authorized.**—The auctioneer does not require to be authorized in any particular manner; though the authority must contemplate a sale by auction, for general authority to sell property does not justify a sale by auction.[36]

Parol authority is usually sufficient, even to sell land, though, as has been seen, statutes in some States now require written authority for a contract to sell land.[37]

§ 630. **Whose agent is he.**—The auctioneer is primarily the agent of the one who employs him to make the sale, and he remains his agent until he accepts the bid. At that time, he becomes the agent of the buyer also, with the assumed assent of both parties, to enable him to sign a memorandum of the sale which shall bind both seller and buyer.[38]

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[35] See Goodrich v. McDonald (1889), 112 N. Y. 157, 19 N. E. 649, Mechem's Cas. 633; *In re* Wilson (1882), 12 Fed. 235, Mech. Cas. 638; Weeks v. Judges (1889), 73 Mich. 256, 41 N. W. 269 Mechem's Cas. 648; Hanna v. Island Coal Co. (1892), 5 Ind. App. 163, 31 N. E. 846, 51 Am. St. R. 246, and note; Manning v. Leighton (1891), 65 Vt. 84, 26 Atl. 258, 24 L. R. A. 684; Randall v. Van Wagenen (1889), 115 N. Y. 527, 22 N. E. 361, 12 Am. St. Rep. 828.

[36] See Towle v. Leavitt (1851), 23 N. H. 360, 55 Am. Dec. 195, Mechem's Cas. 358.

[37] See Doty v. Wilder (1854), 15 Ill. 407, 60 Am. Dec. 756; Johnson v. Dodge (1856), 17 Ill. 433; Wambaugh's Cas. 56. (Statute in Illinois now requires written authority.)

[38] See Doty v. Wilder, *supra;* Kennell v. Boyer (1909), 144 Iowa 303, 122 N. W. 941, Ann. Cas. 1912A, 1127, 24 L. R. A. (N. S.) 488; Garth v. Davis (1905), 120 Ky. 106, 85 S. W. 692, 117 Am. St. R. 571; Love v. Harris (1911), 156 N. Car. 88, 72 S. E. 150, Ann. Cas. 1912D, 1065, 36 L. R. A. (N. S.), 927.

This implied authority would not include other contracts than the memorandum of the sale.

§ 631. Terms of sale.—The owner of the property to be sold has the primary right to fix the terms and conditions of the sale, and, where they are made known at the sale, or the buyer is charged with notice of them, a purchaser can not acquire a good title in violation of them. But secret limitations would not affect the rights of a purchaser who has relied in good faith upon the usual powers exercised by such agents.[39]

If the owner has prescribed no terms, the auctioneer may fix terms, within the limit of what is reasonable and usual in such cases.

This authority is limited to the time of the sale.

§ 632. Implied authority.—The auctioneer has implied authority to accept the bid, and to receive the price, though he may not sell for anything except money, or receive anything but money in payment of the price; or permit the goods to be delivered without payment. He may sue in his own name to recover the price of personal property sold by him. He has no implied power to delegate his authority, or to sell on credit, or to rescind the sale, or to sell at private sale, or to warrant the quality of goods sold, unless that is usual. Like other agents, he is disqualified to sell to himself.[40]

§ 633. Duties to principal.—The auctioneer is bound to his principal to observe loyalty and good faith, and to exercise reasonable skill and diligence.[41]

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[39] See Farr v. John (1867), 23 Iowa, 286, 92 Am. Dec. 426; Bush v. Cole (1863), 28 N. Y. 261, 84 Am. Dec. 343, Mechem's Cas. 650.

If the terms have been properly announced, the fact that a particular buyer did not hear them would not relieve him: Kennell v. Boyer, *supra*.

Announced terms may be shown to have been waived: Mitchell v. Zimmerman (1895), 109 Pa. 183, 58 Am. Rep. 715.

[40] See Thompson v. Kelly (1869), 101 Mass. 291, 3 Am. Rep. 353, Mechem's Cas. 653; Boinest v. Leignez, 2 Rich. (S. C.) L. 464, Mechem's Cas. 655; Blood v. French (1857), 9 Gray (Mass.), 197; Dodd v. Farlow (1865), 11 Allen 426, 87 Am. Dec. 726.

[41] See Hicks v. Minturn (1838), 19 Wend. (N. Y.) 550.

He must obey instructions, take reasonable care of the goods, and account to the principal for their proceeds.[42]

§ 634. Liability to third persons.—The auctioneer who discloses his principal and sells as agent only, and within the limits of his authority, incurs no liability to third persons on the contract of sale; but if he conceals his principal, or pledges his own responsibility he may be personally liable upon the contract.[43]

He may also be liable to third persons for injuries which they sustain by reason of his assuming to act without authority.[44]

§ 635. —— For selling goods of a stranger.—It has been held that an auctioneer who receives and sells the goods of a stranger is liable, even though he acted in good faith, supposing them to be the goods of the person from whom he received them. But other cases hold that he is not so liable where he has paid over the money to the person from whom he received the goods, before he had notice of the fact that such person was not the owner. The weight of authority seems to be that he is liable in these cases also.[45]

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[42] See Steele v. Ellmaker (1824), 11 Serg. & R. (Pa.) 86; Montgomery v. Pacific Coast Land Bureau (1892), 94 Cal. 284, 29 Pac. 640, 28 Am. St. R. 122; Tripp v. Barton (1880), 13 R. I. 130.

Cannot compel principal to accept in settlement anything other than the agreed mode or medium of payment: Rindles v. Bordewyk (1912), 30 S. Dak. 439, 139 N. W. 113.

[43] See Bush v. Cole (1863), 28 N. Y. 261, 84 Am. Dec. 343, Mechem's Cas. 650; Seemuller v. Fuchs (1885), 64 Md. 217, 54 Am. Rep. 766; Meyer v. Redmond (1912), 205 N. Y. 478, 98 N. E. 906, 41 L. R. A. (N. S.) 675; Dent v. McGrath (1867), 3 Bush (Ky.) 174.

[44] Not liable for not holding sale as announced: Harris v. Nickerson (1873), L. R. 8 Q. B. 286, Mechem's Cas. 659.

[45] See Farebrother v. Ansley (1808), 1 Camp. 343; Higgins v. Lodge (1887), 68 Md. 229, 11 Atl. 846, 6 Am. St. R. 437, Mechem's Cas. 656; Frizzell v. Rundle (1889), 88 Tenn. 396, 12 S. W. 918, 17 Am. St. R. 908; Robinson v. Bird (1893), 158 Mass. 357, 33 N. E. 577, 35 Am. St. Rep. 495; Kearney v. Clutton (1894), 101 Mich. 106, 59 N. W. 419, 45 Am.

§ 636. Compensation and lien.—The auctioneer is entitled to compensation for his services, at the agreed or the usual rate; and to reimbursement for his necessary and proper expenditures and liabilities. He has a special property in the goods delivered to him for sale, and a lien upon the goods and their proceeds for his commissions and charges.[46]

§ 637. Liability of principal for acts of auctioneer.—The principal is bound, as in any other case of agency, by the contracts made by the auctioneer within the scope of the authority. And to the same extent as in other cases, also, he is affected by the representations which the auctioneer makes in order to effect a sale.[47]

3. *Of Brokers.*

§ 638. In general.—Brokers, as has been seen, are of many kinds, according to the special branch of trade which they pursue, such as stock brokers, merchandise brokers, insurance brokers, real estate brokers, and the like; but their functions are substantially the same. Their authority and obligations are much controlled by usage, with which it is not only their right but their duty to comply, unless otherwise directed.[48] Usage, however, will not justify a departure from positive instructions, or the disregard of an express contract.

St. R. 394; Consolidated Co. v. Curtis [1892], 1 Q. B. 495; Milliken v. Hathaway (1888), 148 Mass. 69, 19 N. E. 16, 1 L. R. A. 510. *A fortiori* will be liable if he had notice of the third person's rights: Morrow Shoe Mfg. Co. v. New England Shoe Co. (1893), 6 C. C. A. 508, 57 Fed. 685, 24 L. R. A. 417.

[46] See Webb v. Smith (1885), 30 Ch. Div. 192, Mechem's Cas. 661.

[47] See Cockcroft v. Muller (1877), 71 N. Y. 367; Roberts v. French (1891), 153 Mass. 60, 26 N. E. 416, 25 Am. St. R. 611, 10 L. R. A. 656.

[48] See Bibb v. Allen (1892), 149 U. S. 481, 13 Sup. Ct. 950, 37 L. ed. 819; Skiff v. Stoddard (1893), 63 Conn. 198, 26 Atl. 874, 21 L. R. A. 102; Fairly v. Wappoo Mills (1894), 44 S. Car. 227, 22 S. E. 108, 29 L. R. A. 215; De Cordova v. Barnum (1892), 130 N. Y. 615, 29 N. E. 1099, 27 Am. St. R. 538.

They are primarily negotiators of contracts. They seldom have possession of the property respecting which they deal, and can rarely make either actual transfers or deliveries. In the case of stockbrokers, the contrary is not infrequently true.[49]

Since he ordinarily acts in pursuance of particular instructions, the broker is usually to be deemed a special agent, and can bind his principal only while acting in pursuance of the limitations put upon his authority.[50]

§ 639. How authorized.—No particular method of authorization is ordinarily necessary, but the same methods which will suffice in other cases are usually sufficient here. Written authority is not ordinarily required. The fourth section of the statute of frauds, in its relation to contracts for the sale of land, and the seventeenth section, as to contracts for the sale of goods, wares and merchandise, required a note or memorandum of the contract to be made in writing, but in neither case was the authority required to be conferred by writing. The rule respecting contracts for the sale of land has, in some States, been changed by statutes requiring written authority; and in a few States there are special statutory provisions respecting the employment of real estate brokers.

§ 640. What authority implied.—The authority of the broker includes, by implication, as in other cases, authority to do those things which are reasonably necessary and proper to carry into effect the main authority conferred, unless the contrary is declared, and to comply with the established usages of the business. He has no implied authority to delegate his powers, except under the same circumstances which justify it in the case of other agents. His acts usually should be done in the name of his principal only.[51]

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[49] A stock-broker, purchasing and carrying stocks on margin for a customer, is usually regarded as a pledgee of them; in some States, he is regarded as an owner. See 7 Minnesota Law Review, 398; 35 Harvard Law Review, 485; Markham v. Jaudon (1869), 41 N. Y. 235; Covell v. Loud (1883), 135 Mass. 41, 46 Am. Rep. 446.

[50] See Clark v. Cumming (1886), 77 Ga. 64, 4 Am. St. R. 72, Mechem's Cas. 668; Monson v. Kill (1893), 144 Ill. 248, 33 N. E. 43.

Where he has not been limited as to the price at which he shall buy or sell, he has implied authority to fix the price, if he acts in good faith and confines himself to the usual price, or to a fair and reasonable one where there is no usage. Where he is limited, he should follow his instructions, and he can only bind his principal otherwise, where the other party reasonably believes that no limit had been fixed.[52]

§ 641. —— Where he is expected to close a binding contract, he would have implied authority to make and sign the necessary memorandum to make the contract effective under the statute of frauds.[53] The real estate broker, however, as commonly employed by oral request or informal writings, is usually not deemed to be authorized to make a binding contract of sale at all; but, in the ordinary case, is merely expected to find a purchaser to whom the principal may sell.[54] It might, on the other hand, be advantageous or necessary for him to secure from the purchaser he produces the latter's written offer to purchase, which the principal by accepting could turn into a binding contract.

§ 642. —— He has no general authority to sell with a warranty of quality, but may give one where such a warranty is usually given with such goods at that time and place. If not restricted, he may sell upon a reasonable credit. When not entrusted with the possession of the goods he sells, he has no implied authority to receive payment. Having once made a valid contract, he has no implied authority to rescind it.[55]

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[51] See Delafield v. Smith (1889), 101 Wis. 664, 78 N. W. 170, 70 Am. St. R. 938; Haas v. Ruston (1895), 14 Ind. App. 8, 42 N. E. 298, 56 Am. St. R. 288.

[52] See Bigelow v. Walker (1852), 24 Vt. 149, 58 Am. Dec. 156; Hardwick v. Kirwan (1900), 91 Md. 285, 46 Atl. 987; Bass Dry Goods Co. v. Granite City Mfg. Co. (1903), 119 Ga. 124, 45 S. E. 980.

[53] See Coddington v. Goddard (1860), 82 Mass. (16 Gray) 436.

[54] See Duffy v. Hobson (1870), 40 Cal. 240, 6 Am. Rep. 617; Carstens v. McReavy (1890), 1 Wash. 359, 25 Pac. 471; McCullough v. Hitchcock (1899), 71 Conn. 401, 42 Atl. 81; Campbell v. Galloway (1897), 148 Ind. 440, 47 N. E. 818.

§ 643. **Duties to principal.**—The broker must obey the principal's instructions, and will be liable for a loss caused by his disobedience. He owes to his principal the possession and exercise of a reasonable degree of care, skill and diligence. He must be faithful to the interests of his principal, and must not allow his own interests or those of any other employer to conflict with those of his principal. He must also, like other agents, inform his principal of all facts coming to his knowledge, which he is at liberty to communicate, and which it is material for the principal to know for the protection of his interests. Especially must he inform the principal of any adverse interests to which he is already pledged.[56]

§ 644. **Acting for both parties.**—He will not be allowed to represent both parties to the transaction, without the full and intelligent consent of both, except, perhaps, in those cases in which he acts as mere middle-man, bringing the parties together and then leaving them to contract for themselves.[57]

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[55] See Hitchcock v. Griffin & Skelley Co. (1894), 99 Mich. 447, 58 N. W. 373, 41 Am. St. R. 624; Andrews v. Kneeland (1826), 6 Cow. (N. Y.) 354; Dodd v. Farlow (1866), 11 Allen (Mass.) 426, 87 Am. Dec. 726; Adams v. Fraser (1897), 27 C. C. A. 108, 82 Fed. 211; Saladin v. Mitchell (1867), 45 Ill. 79.

[56] See Galigher v. Jones (1889), 129 U. S. 193, 9 Sup. Ct. 335, 32 L. ed. 658; Taussig v. Hart (1874), 58 N. Y. 425; Baker v. Drake (1873), 53 N. Y. 211, 13 Am. Rep. 507, 66 N. Y. 518, 23 Am. Rep. 80; Farnsworth v. Hemmer (1861), 1 Allen (Mass.) 494, 79 Am. Dec. 756; Levy v. Spencer (1893), 18 Colo. 532, 33 Pac. 415, 36 Am St. R. 303.

Broker may not ordinarily buy the property himself, without the principal's intelligent consent. Rich v. Black (1896), 173 Pa. 92, 33 Atl. 880. Consent given where broker concealed material facts, may be withdrawn, Rodman v. Manning (1909), 53 Oreg. 336, 99 Pac. 657, 20 L. R. A. (N. S.) 1158, and Note. But where broker was to have all he could get for the property above a certain price, for his commission, *held*, that he might buy the property himself at price named. Hutton v. Sherrard (1914), 183 Mich. 356, 150 N. W. 135, L. R. A. 1915E, 976.

[57] See Rice v. Wood (1873), 113 Mass. 133, 18 Am. Rep. 459. Mechem's Cas. 12; Bell v. McCon-

Contracts made while the broker is secretly in the employment of the other party are voidable by the principal as in other similar cases.[58]

§ 645. **Liability to third persons.**—The broker will not be personally liable to third persons upon the contracts which he makes with them for his principal, where he discloses the name of his principal, and contracts in his name and within the limits of his authority; though he may make himself personally liable by exceeding his authority, concealing his principal, or contracting on his own responsibility.[59]

Since he usually has not possession, he is not so likely to lay himself open to a charge of conversion, as the factor or auctioneer. He will, however, be liable, it seems, where he receives and sells the property, such as stocks, of a third person, even though he acted in good faith, supposing that the person from whom he received the stock for sale was the true owner, and although he has paid over the proceeds to such person.[60]

§ 646. **Compensation.**—The broker is entitled to his compensation when he has completed his undertaking. If a real estate broker, for example, is employed to find a purchaser for land, he is entitled to his compensation when he has found and produced a person ready, willing and able to buy on the terms proposed, or, if no terms are fixed, to whom the principal sells. He is not to be deprived of his compensation, if he has found such a purchaser, because the principal subsequently changes his mind or his terms, or because the principal's title fails, or

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nell (1881), 37 Ohio St. 396, 41 Am. Rep. 528, Mechem's Cas. 538; Vinton v. Baldwin (1882), 88 Ind. 104, 45 Am. Rep. 447, Mechem's Cas. 664.

[58] See Ferguson v. Gooch (1896), 94 Va. 1, 26 S. E. 397, 40 L. R. A. 234; Cannell v. Smith (1891), 142 Pa. St. 25, 21 Atl. 793, 12 L. R. A. 395.

[59] See Simmons v. Moore (1885), 100 N. Y. 140, 2 N. E. 640, Mechem's Cas. 505.

[60] See Swim v. Wilson (1891), 90 Cal. 126, 27 Pac. 33, 25 Am. St. R. 110, 13 L. R. A. 605, and cases cited *ante* § 396; Roach v. Turk (1872), 56 Tenn. (9 Heisk.) 708, 24 Am. Rep. 360. Compare Leake v. Watson (1893), 58 Conn.

because he can not make a satisfactory conveyance.[61] It is not usually necessary in such a case that the broker shall have actually completed a binding contract.[62] It is enough if he is the procuring cause of the sale, though the transaction is concluded by the principal. According to many cases, the principal is liable, although he did not know, when he made the sale, that he was dealing with a buyer found by the broker.[63]

The same general rules would apply to the undertaking of a broker to procure a loan, sell personal property, and the like.[64]

§ 647. —— If a time has been prescribed, the broker must perform within that time; if no time were prescribed, he must ordinarily perform within a reasonable time, and before the principal has revoked his authority.[65]

Where terms are prescribed, the performance of the broker must comply with those terms.

As will be observed, the real estate broker has, usually, very few of the functions of an agent; he is more like a person working for a reward or competing for a prize.

332, 20 Atl. 343, 18 Am. St. R. 270.

[61] See Vinton v. Baldwin (1882), 88 Ind. 104, 45 Am. Rep. 447, Mechem's Cas. 664; Plant v. Thompson (1889), 42 Kan. 664, 16 Am. St. R. 512, Mechem's Cas. 666; Sibbald v. Bethlehem Iron Co. (1881), 83 N. Y. 378, 38 Am. Rep. 441, Mechem's Cas. 301; Brackenridge v. Claridge (1898), 91 Tex. 527, 44 S. W. 819, 43 L. R. A. 593; Gilder v. Davis (1893), 137 N. Y. 504, 33 N. E. 599, 20 L. R. A. 398; Parker v. Walker (1888), 86 Tenn. 565; Sturgeon v. Culver (1912), 87 Kan. 404, 124 Pac. 419.

[62] As has been already seen, the real estate broker, as ordinarily employed, is not an agent to make a *sale*, but is a negotiator to produce a purchaser. An agent might, of course, be employed in the other capacity.

[63] See Hight v. Marshall (1916), 124 Ark. 512, 187 S. W. 433; Lane v. Cunningham (1913), 171 Mo. App. 17, 153 S. W. 525; Sussdorff v. Schmidt (1873), 55 N. Y. 319. Contra; Quist v. Goodfellow (1906), 99 Minn. 509, 110 N. W. 65, 9 Ann. Cas. 431, 8 L. R. A. (N. S.) 153. Compare Fawley v. Sheldon (1917), 180 Iowa 795, 163 N. W. 585; Ballard v. Archambault (1922), 176 Wis. 217, 186 N. W. 622

[64] See Vinton v. Baldwin, *supra;* Phillips v. Langlow (1909), 55 Wash. 385, 104 Pac. 610; Scovill v. Upham (1893), 55 Minn. 267, 56 N. W. 812.

[65] See Milligan v. Owen (1904),

§ 648. —— **Attempted revocation by principal.**—A principal who is employing a broker to sell land, for example, may agree that he will not sell the land himself, or employ any other broker to sell it. If he does not so agree, he is at liberty to sell the land himself before the broker does, and thus cut off the broker's chance to earn the commission;[66] or to employ other brokers to endeavor to make the sale.[67] The fact that he had agreed to give one broker an "exclusive agency," would not ordinarily mean that he was not free to make a sale himself; it would only exclude other agents.[68]

If the principal has made an agreement of either sort, and breaks it, he will be liable in damages; though the sale made in violation of it would not be affected, so far as the purchaser was concerned.

§ 649. —— Unless there is an agreement to the contrary, the principal may ordinarily revoke the broker's authority without liability at any time before the purchaser has been found, and in such a case the broker will not be entitled to any compensation for what he has done in endeavoring to find a

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123 Iowa 285, 98 N. W. 792.

[66] It is said that the broker is not entitled to notice here, because, under the circumstances, he understands that he is taking a chance. See White v. Benton (1903), 121 Iowa 354, 96 N. W. 876; Mott v. Ferguson (1904), 92 Minn. 201, 99 N. W. 804. *Contra:* Woodall v. Foster (1891), 91 Tenn. 195, 18 S. W. 241.

See also Reams v. Wilson (1908), 147 N. Car. 304, 60 S. E. 1124.

[67] See Cook v. Forst (1896), 116 Ala. 395, 22 So. 540; Hill v. Jebb (1892), 55 Ark. 574, 18 S. W. 1047; (here the principal stated that he was not giving an exclusive right to sell); Hammond v. Mau (1912), 69 Wash. 204, 124 Pac. 377, 40 L. R. A. (N. S.) 1142.

[68] See Dole v. Sherwood (1889), 41 Minn. 535, 43 N. W. 569, 16 Am. St. R. 731, 5 L. R. A. 720; Ingold v. Symonds (1904), 125 Iowa 82, 99 N. W. 713. As to giving "exclusive sale," see Roberts v. Harrington (1918), 168 Wis. 217, 169 N. W. 603, 10 A. L. R. 810, and note.

Principal may not sell to the broker's customer without paying commission: McOmber v. Campion (1922), 219 Mich. 604, 189 N. W. 181.

purchaser.[69] Where, however, the broker has substantially and practically performed, the principal will not be permitted to revoke the authority, and then step in and complete the sale himself, for the very purpose of avoiding the payment of the commission.[70]

Moreover, courts have frequently found, in the circumstances of a particular case, the elements of an agreement that the broker, who had entered upon performance, should have a stated time,[71] or a reasonable time,[72] in which to perform, so that the principal would be liable to the broker if he violated that agreement.

§ 650. —— Several brokers.—Where two or more brokers are employed, each of whom claims that he found the purchaser, that one only is entitled to the commission whose services were the efficient procuring cause of the sale, even though the others may have also contributed in producing the result.[73]

If each produced a different purchaser, that broker would ordinarily be entitled to the commission who first complied with the terms of the principal's offer. If several brokers complied simultaneously, the principal might have to pay a commission to each, though he could not sell to all of the purchasers so produced, or, perhaps, did not sell to any of them.

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[69] See Cadigan v. Crabtree (1901), 179 Mass. 474, 61 N. E. 37, 55 L. R. A. 77; 186 Mass. 7, 70 N. E. 1033, 104 Am. St. R. 543, 66 L. R. A. 982; Cronin v. Securities Co. (1909), 163 Ala. 533, 50 So. 915, 136 Am. St. R. 88.

[70] See Sibbald v. Bethlehem Iron Co. (1881), 83 N. Y. 378, 38 Am. Rep. 441; Mechem's Cas. 301; Rees v. Pellow (1899), 38 C. C. A. 94, 97 Fed. 167; Bowe v. Gage (1907), 132 Wis. 441, 112 N. W. 469, 12 L. R. A. (N. S.) 265.

[71] See Rowan v. Hull (1904), 55 W. Va. 335, 47 S. E. 92, 104 Am. St. R. 998, 2 Ann. Cas. 884; Hartford v. McGillicuddy (1907), 103 Me. 224, 68 Atl. 860, 12 Ann. Cas. 1083, 16 L. R. A. (N. S.) 431; Lapham v. Flint (1902), 86 Minn. 376, 90 N. W. 780.

[72] See Glover v. Henderson (1894), 120 Mo. 367, 25 S. W. 175, 41 Am. St. R. 695; Jaekel v. Caldwell (1893), 156 Pa. 266, 26 Atl. 1063; Dodge v. Childers (1912), 167 Mo. App. 448, 151 S. W. 749.

[73] See Whitcomb v. Bacon (1898), 170 Mass. 479, 49 N. E. 742, 64 Am. St. R. 317; Stone v. Ferry (1908), 144 Ill. App. 191;

A sale through the agency of one ordinarily terminates the offer to pay a commission to the others.

§ 651. Compensation from both parties.—The broker, ordinarily, can not have compensation from both parties, except when he acts as agent of both with their full knowledge and consent. With such knowledge and consent, he may act for both.

Where, however, the broker was acting as a mere "middleman," bringing the parties together only and then leaving them to make their own bargains, — the broker standing entirely indifferent between them, — the rule forbidding double compensation, it is said, does not apply. In such a case, it is held, the broker may have compensation from each principal, although each may have been ignorant of the broker's relations to the other.[74]

Not all authorities, however, assent to this view, unless in exceptional circumstances.

§ 652. Reimbursement, indemnity and lien.—The broker is entitled to reimbursement and indemnity like other agents, for losses and liabilities properly incurred, and advances made on his principal's account; but not where the loss was caused by his own default or the advances were made to further a transaction known to be unlawful.[75]

The broker is ordinarily not in possession of the goods he sells, and therefore generally he has no right of lien. Where

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Votaw v. McKeever (1907), 76 Kan. 870, 92 Pac. 1120; Lewis v. McDonald (1909), 83 Neb. 694, 120 N. W. 207; Higgins v. Miller (1900), 109 Ky. 209, 58 S. W. 580; Grinnell Co. v. Simpson (1911), 64 Wash. 564, 117 Pac. 391.

[74] See Rice v. Wood, *supra;* Bell v. McConnell, *supra;* McDonald v. Maltz (1892), 94 Mich. 172, 53 N. W. 1058, 34 Am. St. R. 331; Montross v. Eddy (1892), 94 Mich. 100, 53 N. W. 916, 34 Am. St. R. 323; Rice v. Davis (1890) 136 Pa. St. 439, 20 Atl. 513, 20 Am. St. R. 931; Twiss v. Herbst (1920), 95 Conn. 273, 111 Atl. 201.

[75] See Perin v. Parker (1888), 126 Ill. 201, 18 N. E. 747, 9 Am. St. R. 571, 2 L. R. A. 336; Ellis v. Pond Syndicate [1898], 1 Q. B. 426; Harvey v. Merrill (1889), 150 Mass. 1, 22 N. E. 49, 15 Am. St. R. 159; Gillett v. Whiting

he has bought and received possession of goods or securities, he would be in a position to assert a lien. Since it is ordinarily his duty to contract in the name of his principal, he has usually no right to sue in his own name upon the contracts which he makes.[76]

4. *Of Factors.*

§ 653. **Who he is.**—The factor, as has been seen, is one whose business it is to receive and sell goods for a commission. He is often termed a commission-merchant. He differs from the broker in the fact that he is entrusted with the possession of the goods to be sold, and usually sells in his own name.

§ 654. **How appointed.**—The authority of the factor may be created and terminated like that of other agents. No particular method is ordinarily necessary.

§ 655. **Implied authority.**—He may sell the goods in his own name, may grant a reasonable credit, and may give a warranty where that is usual. Being entrusted with the possession of the goods, and being authorized to sell in his own name, he may receive so much of the payment for the goods as is to be paid at the time of the sale, or as may become due in the usual course of business and in accordance with the terms of the contract, while the matter still remains in his hands.

Being only an agent, and not an owner, he has no implied authority to pledge or transfer the goods for his own debt, though by statutes, called Factors' Acts, now found in several States, innocent pledgees are protected. He has no implied authority to exchange the goods, to delegate his authority, to compromise the claim for the purchase price, to make negotiable paper, or to receive anything but money in payment for the goods.[77]

(1894), 141 N. Y. 71, 35 N. E. 939, 38 Am. St. R. 762.

[76] See Fairlie v. Fenton (1870), L. R. 5 Exch. 169, Mechem's Cas. 669, Wambaugh's Cas. 561.

[77] See, generally, Pinkham v. Crocker (1885), 77 Me. 563, Mechem's Cas. 676; Warner v. Martin (1850), 11 How. (U. S.) 209, 13 L. ed. 667, Mechem's Cas. 678;

Having completed a sale, he has thereafter no implied authority to rescind it, or to alter the terms or extend the time.

§ 656. Duties to principal.—He must act in good faith, be loyal to his trust, and exercise reasonable skill, care and diligence, in the execution of his authority.[78] He has no more right than any other agent to deal with the goods on his own personal account.

§ 657. —— To obey instructions.—He must ordinarily obey the instructions of the principal as to the time, amounts, places, and terms of sale; and he will be liable to the principal for losses caused by his disobedience.[79] But where he has made advances on the goods to his principal, he may sell contrary to orders, for his own reimbursement, if the principal has neglected to reimburse him within a reasonable time after demand;

Mechanic's Ins. Co. v. Kiger (1880), 103 U. S. 352, 26 L. Ed. 433, Mechem's Cas. 686; Commercial Bank v. Hurt (1892), 99 Ala. 130, 12 So. 568, 19 L. R. A. 701, 42 Am. St. R. 38; Romeo v. Martucci (1900), 72 Conn. 504, 45 Atl. 1, 99, 47 L. R. A. 601; First National Bank v. Schween (1889), 127 Ill. 573, 20 N. E. 681, 11 Am. St. R. 174; Argersinger v. Macnaughten (1887), 114 N. Y. 535, 21 N. E. 1022, 11 Am. St. R. 687.

Whether bailment or sale, see Peek v. Heim (1889) 127 Pa. St. 500, 17 Atl. 984, 14 Am. St. R. 865; Barnes Safe Co. v. Bloch Bros. Co. (1893), 38 W. Va. 158, 18 S. E. 482, 22 L. R. A. 850, 45 Am St. R. 846.

Pledge of Goods: See Paterson v. Tash (1742), 2 Strange 1178, Wambaugh's Cas. 253; Decker v. Storage Co. (1921), 173 Wis. 87, 180 N. W. 256, 17 A. L. R. 416; McCarthy v. Crawford (1908), 238 Ill. 38, 86 N. E. 750, 29 L. R. A. (N. S.) 252; 11 California Law Review, 127; *ante* § 604.

[78] See Phillips v. Moir (1873), 69 Ill. 155, Mechem's Cas. 671; Conway v. Lewis (1888), 120 Pa. St. 215, 13 Atl. 826, 6 Am. St. R. 700; Usborne v. Stephenson (1899), 36 Oreg. 328, 58 Pac. 1103, 48 L. R A. 432; Sims v. Miller (1892), 37 S. Car. 402, 16 S. E. 155, 34 Am. St. R. 762; Charlotte Oil Co. v. Hartog (1898), 29 C. C. A. 56, 85 Fed. 150.

[79] See Talcott v. Chew (1885), 27 Fed. 273, Mechem's Cas. 689; Lehman v. Pritchett (1887), 84 Ala. 512, Mechem's Cas. 693; Hatcher v. Comer (1884), 73 Ga. 418, Mechem's Cas. 698; Comer v. Way (1894), 107 Ala. 300, 19 So. 966, 54 Am. St. R. 93.

and he is not obliged to sell at a price fixed by the principal when he would thereby imperil his security.[80]

§ 658. —— To account.—It is the duty of the factor to account to his principal for all goods, property and moneys of the principal, which come into his hands as factor, after deducting his own proper advances and commissions.[81]

This duty to account would extend to gains or profits made by the factor, as a fruit of the agency, though in violation of his duty of loyalty and good faith.

Where the factor sells upon a *del credere* commission he guarantees the payment of the price.[82]

§ 659. Factor's right to compensation, reimbursement, lien.—The factor is entitled to compensation, reimbursement and indemnity, like other agents. He has also a lien upon the goods in his possession, and upon the price of those sold, and on securities taken for goods sold, to secure the payment of the general balance of the account between himself and his principal, and he may sell the goods to satisfy his claim.[83]

Whether the factor *must* enforce his lien before calling for reimbursement is in dispute.[84]

§ 660. Right to sue.—He may sue in his own name for the price of the goods sold by him; and he has such a special property in the goods that he may maintain actions of trespass, replevin and trover against a third person who injures them or deprives him of their possession.[85]

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[80] See Davis v. Kobe (1886), 36 Minn. 214, 30 N. W. 662, 1 Am. St. R. 663, Mechem's Cas. 700.

[81] See Cooley v. Betts (1840), 24 Wend. (N. Y.) 203, Mechem's Cas. 702.

[82] See Lewis v. Brehme (1870), 33 Md. 412, 3 Am. Rep. 190, Mechem's Cas. 706; Balderston v. National Rubber Co. (1893), 18 R. I. 338, 27 Atl. 507, 49 Am. St. R. 772.

[83] See McGraft v. Rugee (1884), 60 Wis. 406, 19 N. W. 530, 50 Am. Rep. 378, Mechem's Cas. 717; Comer v. Way (1894), 107 Ala. 300, 19 So. 966, 54 Am. St. R. 93; Warren v. First Nat. Bank (1893), 149 Ill. 9, 38 N. E. 122, 25 L. R. A. 746.

[84] See Balderston v. Nat. Rubber Co. (1893), 18 R. I. 338, 27 Atl. 507, 49 Am. St. R. 772; Murphy Co.'s Estate (1906), 214 Pa. 258, 63 Atl. 745, 6 Ann. Cas. 308, 5 L. R. A. (N. S.) 1147; Dolan v. Thompson (1879), 126 Mass. 183, Mechem's Cas. 684.

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[85] See Ilsley v. Merriam (1851), 61 Mass. (7 Cush.) 242, 54 Am. Dec. 721; Fitzhugh v. Wiman (1854), 9 N. Y. 559.

APPENDIX A

STATUTORY PROVISIONS

In several of the States, the law of agency has been, to a greater or less extent, made the subject of statutory enactment. The most important of these provisions are here appended.

CALIFORNIA, NORTH AND SOUTH DAKOTA, AND MONTANA.

The provisions of the North and South Dakota codes and that of Montana are substantially copied from those of California. The California sections are here given. The corresponding sections for North Dakota will be found in Revised Code, 1899, §§ 4303-4355; for South Dakota in Revised Code, 1903, §§ 1656-1708; and for Montana in Code of 1907, §§ 5413-5465. The California sections are taken from Civil Code of 1906, §§ 2295-2369.

CALIFORNIA.

ARTICLE I. DEFINITION OF AGENCY.

SEC. 2295. [Agency, what.] An agent is one who represents another called the principal, in dealings with third persons. Such representation is called agency.

SEC. 2296. [Who may appoint, and who may be an agent.] Any person, having capacity to contract, may appoint an agent; and any person may be an agent.

SEC. 2297. [Agents, general or special.] An agent for a particular act or transaction is called a special agent. All others are general agents.

SEC. 2298. [Agency, actual or ostensible.] An agency is either actual or ostensible.

SEC. 2299. [Actual agency.] An agency is actual when the agent is really employed by the principal.

SEC. 2300. [Ostensible agency.] An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent, who is not really employed by him.

ARTICLE II. AUTHORITY OF AGENTS.

SEC. 2304. [What authority may be conferred.] An agent may be authorized to do any acts which (*his*) principal might do, except those to which the latter is bound to give his personal attention.

SEC. 2305. [Agent may perform acts required of principal by code.] Every act which, according to this Code, may be done by or to any person, may be done by or to the agent of such person for that purpose, unless a contrary intention clearly appears.

SEC. 2306. [Agent cannot have authority to defraud principal.] An agent can never have authority, either actual or ostensible, to do an act which is, and is known or suspected by the person with whom he deals to be, a fraud upon the principal.

SEC. 2307. [Creation of agency.] An agency may be created, and an authority may be conferred, by a precedent authorization or a subsequent ratification.

SEC. 2308. [Consideration unnecessary.] A consideration is not necessary to make an authority, whether precedent or subsequent, binding upon the principal.

SEC. 2309. [Form of authority.] An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing.

SEC. 2310. [Ratification of agent's act.] A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or, where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof.

SEC. 2311. [Ratification of part of a transaction.] Ratification of part of an indivisible transaction is a ratification of the whole.

SEC. 2312. [When ratification void.] A ratification is not valid unless, at the time of ratifying the act done, the principal has power to confer authority for such an act.

SEC. 2313. [Ratification not to work injury to third persons.] No unauthorized act can be made valid, retroactively, to the prejudice of third persons, without their consent.

SEC. 2314. [Rescission of ratification.] A ratification may be rescinded when made without such consent as is required in a contract, or with an imperfect knowledge of the material facts of the transaction ratified, but not otherwise.

SEC. 2315. [Measure of agent's authority.] An agent has such authority as the principal, actually or ostensibly, confers upon him.

SEC. 2316. [Actual authority, what.] Actual authority is such as a principal intentionally confers upon the agent, or intentionally or by want of ordinary care allows the agent to believe himself to possess.

SEC. 2317. [Ostensible authority, what.] Ostensible authority is such as a principal intentionally, or by want of ordinary care, causes or allows a third person to believe the agent to possess.

SEC. 2318. [Agent's authority as to persons having notice of restrictions upon it.] Every agent has actually such authority as is defined by this title, unless specially deprived thereof by his principal and has even then such authority ostensibly, except as to persons who have actual or constructive notice of the restriction upon his authority.

SEC. 2319. [Agent's necessary authority.] An agent has authority:

1. To do everything necessary or proper and usual in the ordinary course of business for effecting the purpose of his agency; and,

2. To make a representation respecting any matter of fact not including the terms of his authority, but upon which his right to use his authority depends, and the truth of which cannot be determined by the use of reasonable diligence on the part of the person to whom the representation is made.

SEC. 2320. [Agent's power to disobey instructions.] An agent has power to disobey instructions in dealing with the subject of the agency in cases where it is clearly for the interest of his principal that he should do so, and there is no time to communicate with the principal.

SEC. 2321. [Authority to be construed by its specific rather than by its general terms.] When an authority is given partly in general and partly in specific terms, the general authority gives no higher powers than those specifically mentioned.

SEC. 2322. [Exceptions to general authority.] An authority expressed in general terms, however broad, does not authorize an agent:

1. To act in his own name, unless it is the usual course of business to do so;

2. To define the scope of his agency; or,

3. To do any act which a trustee is forbidden to do by article two of chapter one of the last title.

SEC. 2323. [What included in authority to sell personal property.] An authority to sell personal property includes authority to warrant the title of the principal, and the quality and quantity of the property.

SEC. 2324. [What included in authority to sell real property.] An authority to sell and convey real property includes authority to give the usual covenants of warranty.

SEC. 2325. [Authority of general agent to receive price of property.] A general agent to sell, who is intrusted by the principal with the possession of the things sold, has authority to receive the price.

SEC. 2326. [Authority of special agent to receive price.] A special agent to sell has authority to receive the price on delivery of the things sold, but not afterwards.

ARTICLE III. MUTUAL OBLIGATIONS OF PRINCIPALS AND THIRD PERSONS.

SEC. 2330. [Principal, how affected by acts of agent within the scope of his authority.] An agent represents his principal for all purposes within the scope of his actual or ostensible authority and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal.

SEC. 2331. [Principal, when bound by incomplete execution of authority.] A principal is bound by an incomplete execution of an authority when it is consistent with the whole purpose and scope thereof, but not otherwise.

SEC. 2332. [Notice to agent, when notice to principal.] As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other.

SEC. 2333. [Obligation of principal when agent exceeds his authority.] When an agent exceeds his authority, his principal is bound by his authorized acts so far only as they can be plainly separated from those which are unauthorized.

SEC. 2334. [For acts done under a merely ostensible authority.] A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith and without (want of ordinary care), incurred a liability, or parted with value, upon the faith thereof. In the South Dakota, North Dakota, and Montana Codes, "ordinary negligence" is substituted for "want of ordinary care."

SEC. 2335. [When exclusive credit is given to agent.] If exclusive credit is given to an agent by the person dealing with him, his principal is exonerated by payment or other satisfaction made by him to his agent, in good faith, before receiving notice of the creditor's election to hold him responsible.

SEC. 2336. [Rights of person who deals with agent without knowledge of agency.] One who deals with an agent, without knowing or having reason to believe that the agent acts as such in the transaction, may set off, against any claim of the principal arising out of the same, all claims which he might have set off against the agent before notice of agency.

SEC. 2337. [Instrument intended to bind principal does bind him.] An instrument within the scope of his authority, by which an agent intends to bind his principal, does bind him, if such intent is plainly inferable from the instrument itself.

SEC. 2338. [Principal's responsibility for agent's negligence or omission.] Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal.

SEC. 2339. [Principal's responsibility for wrongs willfully committed by the agent.] A principal is responsible for no other wrongs committed by his agent than those mentioned in the last section, unless he has authorized or ratified them, even though they are committed while the agent is engaged in his service.

ARTICLE IV. OBLIGATIONS OF AGENTS TO THIRD PERSONS.

SEC. 2342. [Warranty of authority.] One who assumes to act as an agent, thereby warrants, to all who deal with him in that capacity, that he has the authority which he assumes.

SEC. 2343. [Agent's responsibility to third persons.] One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others:

1. When, with his consent, credit is given to him personally in a transaction;
2. When he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so; or,
3. When his acts are wrongful in their nature.

SEC. 2344. [Obligation of agent to surrender property to third person.] If an agent receives anything for the benefit of his principal, to the possession of which another person is entitled, he must, on demand, surrender it to such person, or so much of it as he has under his control at the time of demand, on being indemnified for any advance which he has made to his principal in good faith, on account of the same; and is responsible therefor, if, after notice from the owner, he delivers it to his principal.

SEC. 2345. [Code provisions governing.]. The provisions of this article are subject to the provisions of part one of the first division of this Code.

ARTICLE V. DELEGATION OF AGENCY.

SEC. 2349. [Agent's delegation of his powers.] An agent, unless specially forbidden by his principal to do so, can delegate his powers to another person in any of the following cases, and in no others:

1. When the act to be done is purely mechanical;
2. When it is such as the agent cannot himself, and the subagent can, lawfully perform;
3. When it is the usage of the place to delegate such powers; or,
4. When such delegation is specially authorized by the principal.

SEC. 2350. [Agent's unauthorized employment of subagent.] If an agent employs a subagent without authority, the former is a principal and the latter his agent, and the principal of the former has no connection with the latter.

SEC. 2351. [Subagent rightfully appointed, represents principal.]

A subagent, lawfully appointed, represents the principal in like manner with the original agent; and the original agent is not responsible to third persons for the acts of the subagent.

ARTICLE VI. TERMINATION OF AGENCY.

SEC. 2355. [Termination of agency.] An agency is terminated, as to every person having notice thereof, by:

1. The expiration of its term;
2. The extinction of its subject;
3. The death of the agent;
4. His renunciation of the agency; or,
5. The incapacity of the agent to act as such.

SEC. 2356. [Same.] Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated as to every person having notice thereof, by:

1. Its revocation by the principal;
2. His death; or,
3. His incapacity to contract.

PARTICULAR AGENCIES.

ARTICLE I. AUCTIONEERS.

SEC. 2362. [Auctioneer's authority from the seller.] An auctioneer, in the absence of special authorization or usage to the contrary has authority from the seller only as follows:

1. To sell by public auction to the highest bidder;
2. To sell for cash only, except such articles as are usually sold on credit at auction;
3. To warrant in like manner with other agents to sell, according to section 2323;
4. To prescribe reasonable rules and terms of sale;
5. To deliver the thing sold upon payment of the price;
6. To collect the price; and,
7. To do whatsoever else is necessary, or proper and usual, in the ordinary course of business for effecting these purposes.

SEC. 2363. [Auctioneer's authority from the bidder.] An auctioneer has authority from a bidder at the auction, as well as from the seller, to bind both by a memorandum of the contract as prescribed in the title on sale.

ARTICLE II. FACTORS.

SEC. 2367. [Factor, what.] A factor is an agent, as defined in section 2026. Montana as California; but North Dakota and South Dakota insert after "agent," as follows:—"who is employed to buy or sell property in his own name, and who is intrusted by his principal with possession thereof."

SEC. 2368. [Actual authority of factor.] In addition to the authority of agents in general, a factor has actual authority from his principal, unless specially restricted:

1. To insure property consigned to him uninsured;
2. To sell, on credit, anything intrusted to him for sale, except such things as it is contrary to usage to sell on credit; but not to pledge, mortgage, or barter the same; and,
3. To delegate his authority to his partner or servant, but not to any person in an independent employment.

SEC. 2369. [Ostensible authority.] A factor has ostensible authority to deal with the property of his principal as his own, in transactions with persons not having notice of the actual ownership.

GEORGIA.

Code of 1911.

ARTICLE I. RELATION OF PRINCIPAL AND AGENT AMONG THEMSELVES.

SEC. 3569. [How it arises.] The relation of principal and agent arises wherever one person, expressly or by implication, authorizes another to act for him, or subsequently ratifies the acts of another in his behalf.

SEC. 3570. [Words of description.] An instrument signed by one as agent, trustee, guardian, administrator, executor, or the like, without more, is the individual undertaking of the maker, such words being generally words of description.

SEC. 3571. [What may be done by agent.] Whatever one may do himself may be done by an agent, except such personal trusts in which special confidence is placed on the skill, discretion, or judgment of the person called in to act; so an agent may not delegate his authority to another unless specially empowered to do so.

SEC. 3572. [Executors, etc., may convey by attorney in fact.] Executors, administrators, guardians and trustees are authorized to sell and convey property by attorneys in fact, in all cases where they may lawfully sell and convey in person.

SEC. 3573. [Who may be agent.] Any person may be appointed an agent who is of sound mind; so a principal is bound by the acts of his infant agent, but a *feme covert* cannot be an agent for another than her husband except by his consent, in which case he is bound by her acts.

SEC. 3574. [Agency created, how—agents of corporations.] The act creating the agency must be executed with the same formality (and need have no more) as the law prescribes for the execution of the act for which the agency is created. A corporation may create an agent in its usual mode of transacting business, and without its corporate seal.

SEC. 3575. [Revocation.] 1. Generally, an agency is revocable at the will of the principal. The appointment of a new agent for the performance of the same act, or the death of either principal or agent, revokes the power. If, however, the power is coupled with an interest in the agent himself it is not revocable at will; and in all cases the agent may recover from the principal, for an unreasonable revocation, any damages he may have suffered by reason thereof.

2. But every creditor or other person advancing money upon the pledge of a certificate of stock, or other script representing an ownership or interest in corporations in Georgia, shall have such an irrevocable interest in such certificate of stock or other script as not to be affected by the death, insanity, or legal disability thereafter of the person in whose name such stock or other script stands upon the books of any corporation in Georgia; but such pledgee or holder of such stock or script assigned in blank, coupled with the power of attorney, shall have the same right after the death, insanity or legal disability of the person in whose name said stock stands upon the books of said corporation, as before the death, insanity, or legal disability of such person.

SEC. 3576. [Agent limited by his authority.] The agent must act within the authority granted to him, reasonably interpreted; if he exceeds or violates his instructions, he does it at his own risk, the principal having the privilege of affirming or dissenting, as his interest may dictate. In cases where the power is coupled with an interest in the agent, unreasonable instructions, detrimental to the agent's interest, may be disregarded.

SEC. 3577. [Money deposited by agent.] A principal may follow his money deposited by an agent in the latter's name, and recover the same wherever found, unless the rights of innocent third parties have intervened.

SEC. 3578. [Payment to agent failing to produce obligation.] Where money is due on a written evidence of debt, payment to an agent of the creditor who fails to produce the obligation is at the risk of the debtor. Non-production of the security rebuts the implication of authority arising from the agent's employment, and it must be otherwise established.

SEC. 3579. [Agents and fiduciaries to keep accounts.] It is the duty of agents, trustees, administrators, guardians, receivers, and all other fiduciaries to keep their accounts in a regular manner, and to be always ready with them supported by proper vouchers; neglect of this duty is ground for charging them with interest on balances on hand, and with costs.

SEC. 3580. [Deposit by agent, bank failing.] If the money of a principal is deposited by a private agent, in the name of the principal, in the hands of a banker of good credit, and such deposit is according to the common usage of the place, the agent will not be responsible for any loss arising from the failure of the banker.

SEC. 3581. [Diligence of an agent.] An agent for hire is bound to exercise, about the business of his principal, that ordinary care, skill, and diligence required of a bailee for hire. A voluntary agent, without hire or reward, is liable only for gross neglect.

SEC. 3582. [Agent cannot buy or sell for himself.] Without the express consent of the principal, after a full knowledge of all the facts, an agent employed to sell cannot be himself the purchaser; and an agent to buy cannot be himself the seller.

SEC. 3583. [Personal profit.] The agent must not make a personal profit from his principal's property; for all such he is bound to account.

SEC. 3584. [Estoppel.] An agent cannot dispute his principal's title, except in such cases where legal proceedings, at the instances of others, have been commenced against him.

SEC. 3585. [Agent of several.] Where several persons appoint an agent to do an act for their joint benefit, the instructions of one, not inconsistent with the general directions, shall protect the agent in his act.

SEC. 3586. [Commission and expenses.] An agent who has discharged his duty is entitled to his commission and all necessary expenses incurred about the business of his principal. If he has violated his engagement, he is entitled to no commission.

SEC. 3587. [Broker's right to commission.] The fact that property is placed in the hands of a broker to sell does not prevent the owner from selling, unless otherwise agreed. The broker's commissions are earned when, during the agency, he finds a purchaser ready, able, and willing to buy, and who actually offers to buy on the terms stipulated by the owner.

SEC. 3588. [Suit on breach of contract.] When the contract is for a year, and the employer wrongfully discharges the agent before the end of the year, the agent may either sue immediately for any special injury from the breach of the contract, or, treating the contract as rescinded, may sue for the value of the services rendered, or he may wait till the expiration of the year and sue for and recover his entire wages.

SEC. 3589. [Subsequent earnings in mitigation.] When an agent has been improperly dismissed before the expiration of his time, earnings which were realized or might have been realized by him up to the end of the term should go in mitigation of damages.

SEC. 3590. [Illegal purpose.] No rights can arise to either party out of an agency created for an illegal purpose.

SEC. 3591. [Effect of ratification.] A ratification by the principal relates back to the act ratified, and takes effect as if originally authorized. A ratification may be express, or implied from the acts or silence of the principal. A ratification once made cannot be revoked.

SEC. 3592. [Of mingling goods.] An agent, by willfully mingling his own goods with those of his principal, does not create a tenancy in common, but if incapable of separation the whole belongs to the principal.

ARTICLE II. RIGHTS AND LIABILITIES OF PRINCIPAL AS TO THIRD PERSONS

SEC. 3593. [Principal, how far bound.] The principal is bound by all the acts of his agent within the scope of his authority; if the agent exceeds his authority, the principal cannot ratify in part and repudiate in part; he must adopt either the whole or none.

SEC. 3594. [Forms immaterial.] The form in which the agent acts is immaterial; if the principal's name is disclosed, and the agent professes to act for him, it would be held to be the act of the principal.

SEC. 3595. [Extent of authority.] The agent's authority will be construed to include all necessary and usual means for effectually executing it. Private instructions or limitations not known to persons dealing with a general agent cannot affect them. In special agencies for a particular purpose, persons dealing with the agent should examine his authority.

SEC. 3596. [Failing to disclose principal.] If an agent fails to disclose his principal, yet, when discovered, the person dealing with the agent may go directly upon the principal, under the contract, unless the principal shall have previously accounted and settled with the agent.

SEC. 3597. [Credit given to agent.] If the credit is given to the agent by the choice of the seller, he cannot afterward demand payment of the principal.

SEC. 3598. [Representations by agent.] The principal is bound by all representations made by his agent in the business of his agency, and also by his willful concealment of material facts, although they are unknown to the principal, and known only by the agent.

SEC. 3599. [Notice to.] Notice to the agent of any matter connected with his agency is notice to the principal.

SEC. 3600. [Notice to agent not bind principal, when.] Where an agent conspires with the other party, his principal is not bound thereby, nor charged with knowledge of facts thus acquired by his agent.

SEC. 3601. [Principal bound for neglect and fraud.] The principal is bound for the care, diligence, and fidelity of his agent in his business, and hence he is bound for the neglect and fraud of his agent in the transaction of such business.

SEC. 3602. [Injuries by another agent.] The principal is not liable to one agent for injuries arising from the negligence or misconduct of other agents about the same business; the exception in case of railroads has been previously stated.

Sec. 3603. [Trespass of agent.] The principal is not liable for the willful trespass of his agent, unless done by his command or assented to by him.

Sec. 3604. [Benefit of contract to principal.] The principal shall have advantage of his agent's contracts in the same manner as he is bound by them, so far as they come within the scope of his agency. If, however, the agency has been concealed, the party dealing with him may set up any defense against the principal which he has against the agent.

Sec. 3605. [Money illegally paid, etc.] The principal may recover back money paid illegally, or by mistake of his agent or goods wrongfully transferred by the agent, the party receiving the goods having notice of the agent's want of authority or willful misconduct.

Sec. 3606. [Agent is a competent witness.] The agent is a competent witness either for or against his principal. His interest goes to his credit. The declarations of the agent as to the business transacted by him are not admissible against his principal, unless they were a part of the negotiation, and constituting the *res gestæ*, or else the agent be dead.

Article III. Rights and Liabilities of Agent as to Third Persons.

Sec. 3607. [Agent may act under this Code, for principal.] Any act authorized or required to be done under this Code, by any person in the prosecution of his legal remedies, may be done by his agent; and for this purpose he is authorized to make an affidavit and execute any bond required, though his agency be created by parol. In all such cases, if the principal repudiate the act of the agent, the agent shall be personally bound, together with his sureties.

Sec. 3608. [Money paid by mistake may be recovered.] If money be paid to an agent by mistake, and he in good faith pays it over to his principal, he shall not thereafter be personally liable therefor. In all other cases, he is liable for its repayment. If money be paid by an agent by mistake he may recover it back in his own name.

Sec. 3609. [When he has a right of action.] Generally an agent has no right of action on contracts made for his principal. The following are exceptions:

1. A factor contracting on his own credit.
2. Where promissory notes or other evidences of debt are made payable to an agent of a corporation or joint stock company.
3. In all cases where the contract is made with the agent in his individual name, though his agency be known.
4. Auctioneers may sue in their own name for goods sold by them.
5. In cases of agency coupled with an interest in the agent, known

to the party contracting with him. In all these cases. payment to the principal before notice of the agent's claim is a good defense.

SEC. 3610. [For interference with his possession. An agent having possession, actual or constructive, of the property of his principal, has a right of action for any interference with that possession by third persons.

SEC. 3611. [When responsible for credit given.] Where the agency is known, and the credit is not expressly given to the agent, he is not personally responsible upon the contract. The question to whom the credit is given is a question of fact to be decided by the jury under the circumstances of each case.

SEC. 3612. [Public agents.] Public agents contracting in behalf of the public, are not individually liable on such contracts.

SEC. 3613. [Liability for excess of authority.] All agents, by an express undertaking to that effect, may render themselves individually liable. And every agent exceeding the scope of his authority is individually liable to the person with whom he deals; so, also, for his own tortious act, whether acting by command of his principal or not, he is responsible; for the negligence of his under-servant, employed by him in behalf of his principal, he is not responsible.

SEC. 3614. [Where agent exceeds authority.] When the agent exceeds his authority, so that the principal is not bound, the agent cannot enforce the contract in his own name against the person with whom he deals, unless the contract has been fully executed upon the part of the agent, or the credit was originally given to the agent.

LOUISIANA.

The References are to Merrick's Revised Civil Code of 1900.

CHAPTER I.

ART. 2985.—A *mandate, procuration* or *letter of attorney* is an act by which one person gives power to another to transact for him and in his name, one or several affairs.

ART. 2986.—The mandate may take place in five different manners: for the interest of the person granting it alone; for the joint interest of both parties; for the interest of a third person; for the interest of such third person and that of the party granting it; and finally, for the interest of the mandatory and a third person.

ART. 2987.—The object of the mandate must be lawful, and the power conferred must be one which the principal himself has a right to exercise.

ART. 2988.—The contract of mandate is completed only by the acceptance of the mandatary.

ART. 2989.—A power of attorney may be accepted expressly in the act itself, or by a posterior act.

It may also be accepted tacitly; and this tacit acceptance is inferred, either from the mandatary acting under it, or from his keeping silence when the act containing his appointment is transmitted to him.

ART. 2990.—If the proxy or attorney in fact pleads that he has not accepted or acted under the power, it is incumbent on the principal to prove he has.

ART. 2991.—The procuration is gratuitous unless there has been a contrary agreement.

ART. 2992.—A power of attorney may be given, either by a public act or by a writing under private signature, even by letter.

It may also be given verbally, but of this testimonial proof is admitted only conformably to the title: *Of Conventional Obligations.*

ART. 2993.—A blank may be left for the name of the attorney in fact in the letter of attorney.

In that case, the bearer of it is deemed the person empowered.

ART. 2994.—It may be either general for all affairs, or special for one affair only.

ART. 2995.—It may vest an indefinite power to do whatever may appear conducive to the interest of the principal, or it may restrict the power given to the doing of what is specified in the procuration.

ART. 2996.—A mandate conceived in general terms, confers only a power of administration.

If it be necessary to alienate or give a mortgage, or do any other act of ownership, the power must be express.

ART. 2997.—Thus the power must be express and special for the following purposes:

To sell or to buy.

To incumber or hypothecate.

To accept or reject a succession.

To contract a loan or acknowledge a debt.

To draw or indorse bills of exchange or promissory notes.

To compromise or refer a matter to arbitration.

To make a transaction in matters of litigation; and in general where things to be done are not merely acts of administration, or such as facilitate such acts.

ART. 2998.—A power to compromise on a matter in litigation does not include that of submitting or referring to arbitrators.

ART. 2999.—A power to receive includes that of giving a receipt in acquittance.

ART. 3000.—Powers granted to persons, who exercise a profession, or fulfil certain functions, of doing any business in the ordinary course of affairs to which they are devoted, need not be specified, but are inferred from the functions which these mandataries exercise.

ART. 3001.—Women and emancipated minors may be appointed attorneys; but, in the case of a minor, the person appointing him has no action against him, except according to the general rules relative to the obligations of minors; and in the case of a married woman, who has accepted the power without authority from her husband, she can only be sued in the manner specified under the title: *Of Marriage Contract, and the Respective Rights of the Parties in Relation to their Property.*

CHAPTER II. OF THE OBLIGATIONS OF A PERSON ACTING UNDER A POWER OF ATTORNEY.

ART. 3002.—The attorney in fact is bound to discharge the functions of the procuration, as long as he continues to hold it, and is responsible to his principal for the damages that may result from the non-performance of his duty.

He is bound even to complete a thing which had been commenced at the time of the principal's death, if any danger result from delay.

ART. 3003.—The attorney is responsible, not only for unfaithfulness in his management, but also for his fault or neglect.

Nevertheless, the responsibility with respect to faults, is enforced less rigorously against the mandatary acting gratuitously, than against him who receives a reward.

ART. 3004.—He is obliged to render an account of his management. unless this obligation has been expressly dispensed with in his favor.

ART. 3005.—He is bound to restore to his principal whatever he has received by virtue of his procuration, even should he have received it unduly.

ART. 3006.—In case of an indefinite power, the attorney can not be sued for what he has done with good intention.

The judge must have regard to the nature of the affair, and the difficulty of communication between the principal and the attorney.

ART. 3007.—The attorney is answerable for the person substituted by him to manage in his stead, if the procuration did not empower him to substitute.

ART. 3008.—He is also answerable for his substitute, if, having the power to appoint one, and the person to be appointed not being named in the procuration, he has appointed for his substitute a person notoriously incapable, or of suspicious character.

ART. 3009.—Even where the attorney is answerable for his substitute, the principal may, if he thinks proper, act directly against the substitute.

ART. 3010.—The attorney can not go beyond the limits of his procuration; whatever he does exceeding his power is null and void with regard to the principal, unless ratified by the latter, and the attorney is alone bound by it in his individual capacity.

ART. 3011.—The mandatary is not considered to have exceeded his authority, when he has fulfilled the trust confided to him, in a manner more advantageous to the principal, than that expressed in his appointment.

ART. 3012.—The mandatary, who has communicated his authority to a person with whom he contracts in that capacity, is not answerable to the latter for anything done beyond it, unless he has entered into a personal guarantee.

ART. 3013.—The mandatary is responsible to those with whom he contracts, only when he has bound himself personally or when he has exceeded his authority without having exhibited his powers.

ART. 3014.—When there are several attorneys in fact empowered by the same act, they are not responsible *in solido* for the acts of each, unless such responsibility be expressed in the procuration.

ART. 3015.—The attorney is answerable for the interest of any sum of money he has employed to his own use, from the time he has so employed it; and for that of any sum remaining in his hands from the day he becomes a defaulter by delaying to pay it over.

CHAPTER III. OF THE MANDATARY OR AGENT OF BOTH PARTIES.

ART. 3016.—The *broker* or *intermediary* is he who is employed to negotiate a matter between two parties, and who, for that reason, is considered as the mandatary of both.

ART. 3017.—The obligations of a broker are similar to those of an ordinary mandatary, with this difference, that his engagement is double, and requires that he should observe the same fidelity towards all parties, and not favor one more than another.

ART. 3018.—Brokers are not responsible for events which arise in the affairs in which they are employed; they are only, as other agents, answerable for frauds or faults.

ART. 3019.—Brokers, except in case of fraud, are not answerable for the insolvency of those to whom they procure sales or loans, although they receive a reward for their agency and speak in favor of him who buys or borrows.

ART. 3020.—Commercial and money brokers, besides the obligations which they incur in common with other agents, have their duties prescribed by the laws regulating commerce.

CHAPTER IV. OF THE OBLIGATIONS OF THE PRINCIPAL WHO ACTS BY HIS ATTORNEY IN FACT.

ART. 3021.—The principal is bound to execute the engagements contracted by the attorney, conformably to the power confided in him.

For anything further he is not bound, except in so far as he has expressly ratified it.

ART. 3022.—The principal ought to reimburse the expenses and charges which the agent has incurred in the execution of the mandate, and pay his commission where one has been stipulated.

If there be no fault imputable to the agent, the principal can not dispense with this reimbursement and payment, even if the affair has not succeeded; nor can he reduce the amount of reimbursement, under pretense that the charges and expenses ought to have been less.

ART. 3023.—The mandatary has a right to retain out of the property of the principal in his hands, a sufficient amount to satisfy his expenses and costs.

He may even retain, by way of offset, what the principal owes him, provided the debt be liquidated.

ART. 3024.—The attorney must also be compensated for such losses as he has sustained on occasion of the management of his principal's affairs, when he can not be reproached with imprudence.

ART. 3025.—If the attorney has advanced any sum of money for the affairs of the principal, the latter owes the interest of it, from the day on which the advance is proved to have been made.

ART. 3026.—If the attorney has been empowered by several persons for an affair common to them, every one of these persons shall be bound *in solido* to him for all the effects of the procuration.

CHAPTER V. HOW THE PROCURATION EXPIRES.

ART. 3027.—The procuration expires:

By the revocation of the attorney.

By the attorney's renunciation of the power.

By the change of condition of the principal.

By the death, seclusion, interdiction or failure of the agent or principal.

But powers of attorney by public act or by writings under private signature, or by letter, to transfer on the books of stock corporations, bonds or shares of stock in said corporations, shall be irrevocable, and shall not expire by the death, seclusion, interdiction or failure of the principals, where the said bonds or shares of stock have been previously sold to the persons holding the said powers of attorney, for value received, and said facts are set forth in such powers of attorney.

ART. 3028.—Except in the case of irrevocable powers of attorney, as prescribed in the preceding article, the principal may revoke his power of attorney whenever he thinks proper, and, if necessary, compel the agent to deliver up the written instrument containing it, if it be an act under private signature.

ART. 3029.—If the principal only notifies his revocation to the attorney, and not to the persons with whom he has empowered the attorney to transact for him, such persons shall always have the right of action against the principal to compel him to execute or ratify what has been done by the attorney; the principal has, however, a right of action against the attorney.

ART. 3030.—The appointment of a new attorney to transact the same business produces the same effect as a revocation of the first, from the day such appointment is notified to the first attorney.

ART. 3031.—The attorney may renounce his power of attorney by notifying to the principal his renunciation.

Nevertheless, if this renunciation be prejudicial to the principal, he ought to be indemnified by the agent, unless the latter should be so situated that he can not continue the agency without considerable injury.

ART. 3032.—If the attorney, being ignorant of the death or of the cessation of the rights of his principal, should continue under his power of attorney, the transactions done by him, during this state of ignorance, are considered as valid.

ART. 3033.—In the cases above enumerated, the engagements of the agent are carried into effect in favor of third persons acting in good faith.

ART. 3034.—In case of the death of the attorney, his heir ought to inform the principal of it, and in the meantime, attend to what may be requisite for the interest of the principal.

APPENDIX B

FORMS

A SIMPLE FORM FOR A POWER OF ATTORNEY.

Know all men by these presents: That I (or we) [here name the principal] of [place of residence] have made, constituted and appointed, and by these presents do hereby make, constitute and appoint [here name the agent] my [or our] true and lawful attorney for me [or us] and in my [or our] name, place and stead, to [here state act or acts which agent is to be authorized to perform].

Giving and granting unto my [or our] said Attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I [or we] might or could do if personally present; hereby ratifying and confirming all that my [or our] said Attorney shall lawfully do or cause to be done by virtue of these presents.

In Witness Whereof,........have hereunto set........hand........

and seal........the........day of........A. D. 19.....

Signed, Sealed and Delivered
in the Presence of
....SEAL

....SEAL

A VERY GENERAL POWER OF ATTORNEY.

Know all Men by these Presents:

That ....
have made, constituted and appointed, and by these presents do hereby make, constitute and appoint....................................
my true and lawful Attorney for me and in my name, place and stead and for my use and benefit, to act for and represent me in all of my

business while I am absent from the United States, engaged in the service of the Government, and for that purpose to ask, demand, sue for, recover, collect and receive all such sums of money, debts, dues, accounts, legacies, bequests, interests, dividends, annuities and demands whatsoever, as are now or shall hereafter become due, owing, payable or belonging to me; and have, use and take all lawful ways and means in my name, or otherwise, for the recovery thereof, by legal process, and to compromise and agree for the same, and grant acquittances or other sufficient discharges for the same, for me and in my name; to bargain, contract, agree for, purchase, receive and take lands, tenements, hereditaments, and accept the seisin and possession of all lands, and all deeds, and other assurances in the law therefor; and to lease, let, demise, bargain, sell, remise, release, convey or mortgage lands, tenements and hereditaments, upon such terms and conditions, and under such covenants as he shall think fit. Also to bargain and agree for, buy, sell, mortgage, hypothecate and in any and every way and manner deal in and with goods, wares and merchandise, choses in action, and other property in possession or in action; and to make, do and transact all and every kind of business of what nature and kind soever; and, also, for me and in my name, and as my act and deed, to sign, seal, execute, deliver, and acknowledge such deeds, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes, receipts, evidences of debts, releases and satisfaction of mortgage, judgment and other debts, and such other instruments in writing, of whatever kind and nature, as may be necessary or proper in the premises.

Giving and granting unto said Attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as might or could do if personally present, hereby ratifying and confirming all that said Attorney shall lawfully do or cause to be done by virtue of these presents.

In Witness Whereof,.........have hereunto set.........hand and seal the.........day of.........A. D. 19.....

Signed, Sealed and Delivered
in Presence of

..........................SEAL

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A POWER OF ATTORNEY TO VOTE AT A MEETING OF STOCKHOLDERS COMMONLY CALLED A PROXY.

THE NEW YORK CENTRAL RAILROAD COMPANY.

The undersigned Stockholder of The New York Central Railroad Company hereby appoints William K. Vanderbilt, Alfred H. Smith and Edward F. Stephenson or any one of them, to vote as the attorney and proxy of the undersigned at the annual meeting of the Stockholders of the said Company, appointed to be held at the said Company's principal office in the City of Albany, N. Y., on the fourth Wednesday (being the 24th day) of January, 1923, at 12 o'clock noon, or at any adjournment thereof, in the Election of Directors of the said Company, and three Inspectors of the next election, and in the transaction of such other business as may lawfully be brought before the meeting; and in the name of the undersigned to act at such meeting, or adjournment thereof, or in any proceeding which may then take place, according to the number of shares of stock standing in the name of the undersigned, and as fully as the undersigned could do if personally present—with full power of substitution to them or any one of them.

Witness the hand and seal of the undersigned this........day of

........, 192.....

Witness:

....[L. S]

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